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# Part 1: 2015 Update – What's New

# 2015 Update to SEP Policy

- Reflects current practice and consolidates wealth of existing SEP guidance issued since 1998.
- Intended to encourage use of the Policy by helping facilitate inclusion of SEPs in civil enforcement settlements, whenever appropriate.
  - Case teams should consider SEPs early in the settlement process and, if appropriate, provide SEP ideas to defendants.
- Underscores EPA's strong support for SEPs, which can be powerful tools to help:
  - Secure significant environmental and public health benefits beyond those achieved by compliance, and
  - Address the needs of communities impacted by violations of environmental laws.

# What's New/Looks Different

- Addition of a Table of Contents.
- Introduction now highlights notable Agency priorities: Children's Health, Environmental Justice, Innovative Technology, Climate Change and Pollution Prevention.
- Legal guidelines section revised:
  - Discussion of nexus requirement restructured.
  - Augmentation prohibition clarified.
  - Augmentation analysis checklist provided.
- Describes the revised approach to stipulated penalties for failure to satisfactorily complete a SEP.



## What's New/Looks Different (cont.)

- Updates Community Input discussion.
- Compiles all required certifications:
  - Standard consent decree/consent agreement SEP certification language, to ensure consistency in our national practice.
  - Specific certifications relating to:
    - Non-deductibility
    - Augmentation
    - Diesel Emissions Reduction SEPs
- Clarifies points of longstanding implementation practice.

# What's New/Looks Different (cont.)

2015 Update includes discussion of SEPs in special situations.

- Decisions made by senior managers over past few years:
  - Third-party compliance projects
  - SEPs in “ability-to-pay” settlements
  - No acceptance of SEPs in lieu of stipulated penalties
  - Role of third-party SEP implementers and recipients
  
- Previously issued SEP guidance incorporated into Update:
  - Environmental Management Systems
  - Profitable SEPs
  - Aggregation of SEPs

## Part 2: SEP Basics

# 2015 Update Does Not Change SEP Definition

- Performed in settlement of an enforcement action;
- Provides environmental or public health benefits to the community or environment harmed or potentially harmed as a result of a violation of environmental law;
- Undertaken voluntarily by violator;
- Goes beyond what violator is required to do under federal, state or local environmental requirements;
- Not otherwise required by law.

# SEP Categories

Categories of SEPs are the same:

1. Public health
2. Pollution prevention
3. Pollution reduction
4. Environmental restoration and protection
5. Assessments and audits
6. Environmental compliance promotion
7. Emergency planning and preparedness
8. Other

# Unacceptable as SEPs

Some projects cannot, due to legal and/or policy constraints, be accepted as SEPs. Including, but not limited to:

- Cash donations can be construed as a diversion of penalty funds, are not discrete projects with environmental benefit.
- Projects that may be beneficial to a community, but are unrelated to environmental protection, do not have nexus to support enforcement discretion.
- Projects that involve funding with low-interest federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance, may present an augmentation of federal funding.

# SEPs and Penalties

- SEPs ARE NOT PENALTIES, nor are they accepted in lieu of penalties;
- SEPs are one of several factors that EPA may consider when determining an appropriate final settlement package consisting of penalty, injunctive relief, and SEP.

# SEPs and Penalties – Minimum Penalty Requirement

- Settlements with a SEP must include a minimum penalty that is the greater of:

25% of the gravity-based penalty, or

10% of the gravity-based penalty + economic benefit.

- AA for OECA must approve a waiver from the SEP Policy for settlements with SEPs that do not collect the minimum penalty amount.



# SEPs and Mitigation of Potential Penalties

- EPA may mitigate potential penalties when a violator offers to perform a SEP. Generally, penalty mitigation amount may not exceed 80% of the cost of the SEP.
- Mitigation up to 100% of SEP cost only appropriate when the SEP is of outstanding quality AND is:
  - Performed by small business, government entity or non-profit OR
  - Pollution prevention project
- Also, for outstanding quality SEPs that provide significant benefits to a community with environmental justice concerns, case teams can consider higher penalty mitigation.

# Evaluation Criteria

Proposals should be reviewed carefully to determine how much the SEP will:

- Provide significant, quantifiable benefits to public health or the environment;
- Mitigate damage or reduce risk to communities with environmental justice concerns;
- Reflect community input;
- Further the development and implementation, innovative processes, technologies, or methods;
- Reduce emissions to more than one media;
- Develop and implement pollution prevention techniques and practices that reduce the generation of a pollutant.

# Community Input

The 2015 Update encourages input on project proposals from the local community adversely impacted by the violations.

- Case teams should encourage defendants to seek community input early in the SEP development process.
  - Ideally, community input should be sought by the defendant and the EPA collaboratively.
- If a case team is aware of community interest in particular SEPs, the case team may share that information with the defendant.
- EPA encourages defendants to reach out to the affected community and solicit input about appropriate projects. This takes time, and not all defendants are willing to engage with the community.

# Part 3: Legal Guidelines

## Legal Guidelines: Prosecutorial Discretion

- SEPs are one of several factors that EPA may consider under its general enforcement discretion in determining an appropriate settlement.
- SEP may not be inconsistent with any provision of the underlying statute; and
- SEP must advance at least one objective of the underlying statute.

# Legal Guidelines: Nexus

- SEPs must have a “nexus”, or connection, with the underlying violation. Nexus can never be waived.
- Nexus helps ensure:
  - Appropriate use of prosecutorial discretion.
  - Compliance with the Miscellaneous Receipts Act (MRA).

# Legal Guidelines: Nexus

- SEP must relate to the underlying violation by reducing:
  - Likelihood that similar violations will occur in the future;
  - Adverse impact to public health or the environment to which the violation at issue contributes; or
  - Overall risk to public health or the environment potentially affected by the violation at issue.

## Legal Guidelines: More on Nexus

- Must advance at least one objective of the environmental statute on which the enforcement action is based.
- Geographic proximity to the site of the violation is not enough to establish nexus. However, if the SEP's primary impact is at the same facility, ecosystem, or immediate area, nexus is easier to establish



# Legal Guidelines: Nexus and the MRA

- The Miscellaneous Receipts Act (MRA):

"an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

- Accepting a project without nexus could be viewed as a diversion of penalty funds from the U.S. Treasury and potential violation of the MRA.

- GAO has stated that acceptance of a project without nexus circumvents the MRA.

- Ensuring strong nexus for a SEP considered in determining final settlement amount is critical to appropriate exercise of enforcement discretion.

# Nexus: Examples

- Facility A exceeded its permit levels for release of mercury. The SEP proposed is a mercury thermometer exchange/distribution program in which members of the community will receive digital mercury-free thermometers.
- Facility B has a release of fuel oil to a local river resulting in streambank damage and a fish kill. The settlement includes a penalty and injunctive relief to remediate the river. The SEP proposed is for additional streambank restoration along a tributary to that river.
- Facility C is a lead smelter which has exceeded permitted levels for particulate matter, which can cause respiratory illness including asthma and chronic bronchitis. Facility agrees to purchase and operate a mobile asthma clinic, providing evaluation and treatment to the local community.

# Legal Guidelines: Augmentation of Appropriations

- The Constitution, places the power of the purse in Congress:  
"No money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. Const. art. I, Section 9, cl.7.
- Together with MRA, assures that the Executive Branch must depend on Congressional appropriations.
- Congress may enact exceptions to this requirement that all money received by the U.S. must be deposited in the Treasury.

# Legal Guidelines: Augmentation of Appropriations

Per the Comptroller General, the rule against augmentation derives from:

## ➤ MRA

- Instructs government agents receiving money for the Government from any source to deposit the money in the Treasury as soon as practicable without deduction;

## ➤ Purpose Statute, 31 U.S.C. section 1301(a)

- Restricts use of appropriated funds to their intended purpose; and

## ➤ 18 U.S.C. section 209

- Prohibits payment of, contribution to, or supplementation of the salary of a government officer or employee as compensation for his or her official duties from any source other than the government of the United States.

# Legal Guidelines: EPA-Specific Provisions

- EPA may not manage or control funds used for a SEP, nor retain authority to manage or administer a SEP.
  - EPA may perform oversight to ensure that a SEP is properly implemented, and have legal recourse if it is not adequately performed.
- SEPs may not be used to satisfy EPA's statutory obligation to perform a particular activity, or to circumvent a statutory prohibition on performing an activity.

## Legal Guidelines: EPA-Specific Provisions

SEP may not provide additional resources (including in-kind contributions of goods and services) :

- To perform a particular activity for which EPA receives a “specific appropriation.”
- To support specific activities performed by EPA employees or EPA contractors.
- To perform work on EPA-owned property.
- To a recipient in a particular federal financial assistance transaction with the EPA, for the same specific activity described in the terms or scope of work for the transaction.

## Legal Guidelines: Other Agency Provisions

SEP may not provide additional resources (including in-kind contributions of goods and services):

- For a project performed by another federal agency.
- To perform work on federally-owned property.
- To a recipient in a particular federal financial assistance transaction with another federal agency, for the same specific activity described in the terms or scope of work for the transaction.
- If the Respondent is the federal agency or if the SEP recipient is a federal agency with gift authority, these provisions do not apply.

# Legal Guidelines: Augmentation of Appropriations

## Example:

- Small Business Liability Relief and Brownfields Revitalization Act of 2002: In FY06 Congress appropriated \$90 million in STAG funds for a competitive brownfields assessment and cleanup grant program.
- This statute is considered to be a specific appropriation for a particular activity.
- Since 2006, EPA has continued to receive appropriations to fund this grant program; therefore, EPA is prohibited from accepting projects relating to brownfields cleanup and assessment as SEPs.



# Diesel SEPs – A Partial Exception

- In 2008, Congress enacted legislation granting EPA authority to accept diesel emissions reduction SEPs despite the fact that EPA receives a specific appropriation to provide grant funding for such projects.
- So, EPA need not consider the specific appropriation or whether there is a grant that would fund proposed diesel SEPs.
- EPA must still do the rest of augmentation analysis, and ensure there is nexus.
- The statute requires a specific certification. See Legal Guideline IV.D.

# How to Perform the Augmentation Inquiry

The 2015 Update contains a new “Appendix A, Reasonable Inquiry Checklist” to assist EPA case teams and defendants.

- Delineates EPA’s and the Defendant’s respective roles.
- Provides helpful definitions (e.g., “open federal financial assistance transaction”).
- Provides a step-by-step checklist for performing the inquiry.

# Part 4: SEPs and Settlement Requirements

# 2015 Update Provides Detailed Settlement Guidance

## Consent Decrees/Consent Agreements with a SEP should:

- Completely describe the SEP, including timeframe for completion;
- Clearly define “satisfactory completion”;
- Include stipulated penalties for failure to satisfactorily perform the SEP;
- Include a requirement for violator to submit a SEP completion report;
- Provide for reliable and objective means to verify timely and complete performance and amount of expenditures; and
- Include all required certifications.

# SEP Certifications

- 2015 Update provides standard SEP settlement language to ensure consistency in judicial and administrative settlements.

With regard to the SEP, Defendant certifies the truth and accuracy of each of the following:

- That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that Defendant in good faith estimates that the cost to implement the SEP[, exclusive of \_\_\_\_\_ costs,] is \$\_\_\_\_\_;
- That, as of the date of executing this Decree, Defendant is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;
- That the SEP is not a project that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;
- That Defendant has not received and will not receive credit for the SEP in any other enforcement action;
- That Defendant will not receive reimbursement for any portion of the SEP from another person or entity;
- That for federal income tax purposes, Defendant agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP;
- Augmentation Certification (see Section IV.C);and
- Diesel Emissions Reduction SEP Certification (where applicable, see Section IV.D).

# Augmentation Certification

➤ Required as of 2011:

Defendant certifies that:

- a. It is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in paragraph X; and
- b. It has inquired of the SEP recipient and/or SEP implementer [use proper names where available] whether either is a party to an open federal financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the recipient and/or the implementer [use proper names where available] that neither is a party to such a transaction.

# Diesel SEP Certification

- Required by law, since 2008, for settlements that include diesel emissions reduction projects:

Defendant certifies under penalty of law that it would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction Supplemental Environmental Project, if the Agency were precluded by law from accepting a diesel emissions reduction Supplemental Environmental Project.

- See Act of June 30, 2008, Pub. L. No. 110–255, § 1, 122 Stat. 2423.

# Deductibility Certification

- As of December 2007, judicial and administrative settlements, must include the following language reflecting the respondent's/violator's commitment not to deduct or capitalize the cost of implementing the SEP:

“For federal income tax purposes, (Defendant/Respondent) agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.”



# Third Parties in Settlements with SEPs

2015 Update clarifies that EPA may not:

- Direct, recommend, or propose that the defendant hire a particular contractor or consultant to carry out the SEP.
- Direct, recommend or propose a specific organization to be the recipient of a SEP.

However, EPA may:

- Retain the right to disapprove contractors, consultants or organizations that the defendant proposes for Agency consideration.
  - Based on objective criteria for assessing the entity's qualifications (e.g., experience, capacity, technical expertise) and fitness.
- Specify the type of organization that will be the SEP recipient.

# Part 5: Stipulated Penalties

# Stipulated Penalties for Failure to Complete a SEP

2015 Update eliminates the formula provided in the 1998 Policy and describes revised, more flexible approach to including stipulated penalties in settlements.

- Why are stipulated penalties necessary?
  - Defendants who agree to perform a SEP receive mitigation of a federal penalty.
  - Stipulated penalties ensure that EPA and the public receive the benefits expected from the SEP.

## Stipulated Penalties (Cont.)

- Stipulated penalties may be structured as a lump sum, daily, or both.
- Stipulated penalties may be included for:
  - Failure to meet interim milestones, to submit required progress reports, and/or to provide a SEP completion report; and/or
    - \* Daily stips probably most appropriate.
  - Failure to satisfactorily complete the SEP as described.
    - \* Including situations where the EPA deems the SEP to have been abandoned by the defendant, or where the SEP has not been satisfactorily completed because the defendant has not expended the agreed-upon SEP cost.

## Stipulated Penalties (Cont.)

What is an appropriate amount of stipulated penalty?

- Lump-sum stipulated penalties for failure to complete the SEP must exceed the estimated cost of the SEP.
- Stipulated penalties that exceed the estimated cost of the SEP:
  - Provide an incentive to the defendant to complete the SEP satisfactorily; and
  - Ensure that the EPA receives the full benefit of the settlement.
- U.S. always has the discretion to reduce or waive stipulated penalties otherwise due.

# SEPs and Dispute Resolution

2015 Update reflects decision that:

- Settlements including SEPs may include provisions for dispute resolution only for determining whether the SEP has been satisfactorily completed, pursuant to the terms of the agreement.

# Part 6: Special Situations

# SEPs in Ability-To-Pay (ATP) Settlements

2015 Update clarifies that SEPs may be included in ATP settlements only where:

- Defendant is able to pay the minimum penalty required by the Policy

Minimum penalty must be determined before the settlement penalty is reduced based on ATP considerations;

- SEP must be of outstanding quality and meet at least one of the SEP Policy exceptions allowing 100% credit (small entity or P2); and
- Defendant has demonstrated capacity to effectively manage and implement a SEP.



# Third Party Compliance Projects

2015 Update clarifies that activities legally required of any party are generally prohibited as SEPs.

- Exceptions to this prohibition have been granted (with prior HQ approval) where:
  - SEP involved an activity legally required of residents of a community with environmental justice concerns;
  - Residents were financially unable to comply with requirement; and
  - SEP provided significant public health and/or environmental benefits.

# Acceptance of SEPs in Lieu of Stipulated Penalties

2015 Update reiterates that, where penalties have been stipulated penalties for violations of a CD or other settlement agreement, those stipulated penalties may not be mitigated by a SEP, or converted into a project.

- However, the AA for OECA may consider mitigating potential stipulated penalty liability using SEPs where:
  - Despite the circumstances giving rise to the claim for stipulated penalties, the violator has the ability and intention to comply with a new settlement agreement obligation to implement the SEP;
  - No negative impact on the deterrent purposes of stipulated penalties; and
  - Settlement agreement establishes a range for stipulated penalty liability for the violations at issue.

# Crafting Agreements with SEPs as Stipulated Remedies

Future settlement agreements may be drafted to stipulate that a defendant will perform a particular SEP in addition to or as an alternative to paying stipulated penalties, in the event there is noncompliance with requirements in that agreement.

- Such a stipulated SEP must be fully identified and set forth in the CD, with same level of detail as any other SEP, and meet all SEP Policy requirements.
- Potential CD violations must also be identified to ensure nexus, etc.

When a settlement agreement is being amended, a stipulated SEP may be included for future noncompliance with:

- New requirements added by the amendment; or
- Requirements that were part of the original agreement, provided that the defendant has been staying in compliance with those terms, before and during drafting the amendment.

## Part 7: Frequently Asked Questions

# Why are there so many constraints on SEPs?

The constraints on what can be an appropriate SEP are rooted in federal laws, and are intended to avoid:

- Augmentation of federal appropriations.
- Diversion of penalty funds from the Treasury.
- Inappropriate exercise of EPA's enforcement discretion in settling a case (if SEP had insufficient nexus to the violations, or did not provide an otherwise unavailable environmental/public health benefit).

# Why doesn't every settlement include a SEP?

Many factors impact the ease with which a SEP can be included in a settlement:

- SEPs are voluntary and EPA cannot require or demand that a defendant perform a SEP.
- Many defendants prefer to pay a penalty and complete the enforcement process quickly.
- Negotiating an appropriate SEP can significantly extend the time to reach settlement.
- Defendants typically expend more overall in a settlement that includes a SEP. SEPs are not accepted “in lieu of” a penalty; the additional expense associated with implementing a SEP may discourage some defendants.
- It can be difficult to identify a project with an appropriate nexus.

# Isn't a SEP just a diversion of funds from the Treasury?

- In any negotiated enforcement settlement, initial penalty calculations may be adjusted for a variety of reasons. Since performance of a SEP indicates a defendant's willingness to provide a public health or environmental benefit beyond its compliance obligations, it is appropriate for EPA to adjust its initial penalty calculation downwards.
- To ensure that EPA is appropriately extending its prosecutorial discretion, projects submitted by a defendant for consideration must have a nexus, or connection, to the violations being resolved, and advance the goals of the statute from which the violations stemmed.
- Settlements with SEPs always include a final penalty that retains the deterrent value of the settlement, addresses the gravity of the violation, and recoups the economic benefit that the violator realized from its noncompliance.

Aren't defendants being coerced to do projects that EPA wants but for which Congress has decided not to appropriate funds?

- The SEP Policy makes it clear that proposed SEPs are developed, funded and implemented by a defendant, and that EPA must not direct, control, or manage SEP funds in any way. While EPA retains the right to reject a SEP proposal, the Agency does not impose a preference for particular projects on defendants.
- In many cases, defendants enter into negotiations with a SEP proposal already in mind. EPA also encourages defendants to reach out to local communities about project ideas, and if EPA is aware of potential projects that have community support, EPA provides that information to defendants for their consideration.



# What are the results of the SEP Program?

- The SEP Policy is a settlement policy – there is no SEP Program. While EPA supports the inclusion of SEPs in settlements, the Agency does not develop, fund, or implement SEPs.
- Since 1998, SEPs have been included in nearly 3,000 settlements (out of nearly 33,800 concluded settlements), and defendants have spent nearly \$1 billion over this time implementing public health and environmental projects.
- Examples include:
  - Blood level testing targeting children in a disadvantaged community
  - Conservation of green space/establishment of buffer zones to protect sensitive water bodies
  - Emergency response equipment and hazardous materials training for local first responders
  - Household hazardous waste collection and disposal programs

**To:** Cozad, David[Cozad.David@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Shinkman, Susan[Shinkman.Susan@epa.gov]  
**From:** Fogarty, Johnpc[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]  
**Sent:** Wed 1/25/2017 9:59:10 PM (UTC)  
**Subject:** SEP material  
[2015 SEP Update.pdf](#)

Dave & Larry – attached is a powerpoint with what we use to train both new folks on SEPs as well as staff already familiar with SEPs on what's new/different in the 2015 update to the policy. It strikes a good balance in the level of detail but without being as overly dense as the policy itself. It may be good as a “read ahead” for tomorrow’s briefing. We were planning to work from this to walk through the who/what/why/how of SEPs (but not going through every slide – just hitting the high/important points).

## Agenda

OCE Weekly – AA/DAA/PDAA

Conference Call Number: 1 (202)-991-0477 Conference ID: 6632444

Conference Room 3216 WJC South

July 18, 2019

3:30 PM – 4:30 PM

1. **Ex. 5 AC / Ex. 7(A)** (WED) - Region 3 joining
2. **Ex. 5 AC / Ex. 7(A)** (WED) - Region 3 joining
3. **Ex. 5 AC / Ex. 7(A)** – no paper
4. Federal Lead Action Plan – no paper
5. DOJ Draft SEP Memo – no paper



**Ex. 5 DP / AC / AWP / Ex. 7(A)**

# **Ex. 5 DP / AC / AWP / Ex. 7(A)**



**Ex. 5 DP / AC / AWP / Ex. 7(A)**



# **Ex. 5 DP / AC / AWP / Ex. 7(A)**

**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Koslow, Karin[Koslow.Karin@epa.gov]  
**From:** Kelley, Rosemarie[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23B7C900323047FCA012DF62C58C4D22-RKELLEY]  
**Sent:** Wed 5/22/2019 11:01:17 PM (UTC)  
**Subject:** Ex. 5 AC / Ex. 7(A)

Kristin –

Could you ask Morgan to follow up with Nat on Larry’s questions?

Rosemarie

---

**From:** Starfield, Lawrence  
**Sent:** Wednesday, May 22, 2019 9:20 AM  
**To:** Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Cc:** Koslow, Karin <Koslow.Karin@epa.gov>  
**Subject:** Ex. 5 AC / Ex. 7(A)

What is Nat’s plan? Ex. 5 AC / Ex. 7(A)

Larry

This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

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**From:** Kelley, Rosemarie  
**Sent:** Tuesday, May 21, 2019 7:21 PM  
**To:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Koslow, Karin <Koslow.Karin@epa.gov>  
**Subject:** Ex. 5 AC / Ex. 7(A)

Ex. 5 AC / Ex. 7(A)

I think this is DOJ’s call, but let me know if you would like me to raise it with Tom.

Rosemarie

Regards,  
Rosemarie A. Kelley, Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
202-564-4014

**To:** Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Shiffman, Cari[Shiffman.Cari@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]  
**From:** Bailey-Morton, Ethel[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9B33DD651FA04119BE02B7B6B151FF91-BAILEY, ETHEL]  
**Sent:** Tue 5/28/2019 7:29:45 PM (UTC)  
**Subject:** RE: Materials for Claire Murray SEP meeting -- REVISED Talking Points

Thank you

---

**From:** Makepeace, Caroline  
**Sent:** Tuesday, May 28, 2019 3:29 PM  
**To:** Bailey-Morton, Ethel <Bailey-Morton.Ethel@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Shiffman, Cari <Shiffman.Cari@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>  
**Subject:** RE: Materials for Claire Murray SEP meeting -- REVISED Talking Points

The revised talking points, attached

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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---

**From:** Bailey-Morton, Ethel  
**Sent:** Tuesday, May 28, 2019 3:06 PM  
**To:** Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Shiffman, Cari <Shiffman.Cari@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>  
**Subject:** RE: Materials for Claire Murray SEP meeting

Caroline,

Please provide copies to the IO office for this meeting tomorrow.

Thanks,  
Ethel

---

**From:** Makepeace, Caroline  
**Sent:** Tuesday, May 28, 2019 3:04 PM  
**To:** Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Shiffman, Cari <Shiffman.Cari@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Bailey-Morton, Ethel <Bailey-Morton.Ethel@epa.gov>  
**Subject:** RE: Materials for Claire Murray SEP meeting

Just got some feedback from Larry on the talkers, so will be tweaking that piece and re-sending.

Caroline Makepeace  
Senior Counsel

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**From:** Makepeace, Caroline

**Sent:** Tuesday, May 28, 2019 2:57 PM

**To:** Bodine, Susan <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>

**Cc:** Shiffman, Cari <[Shiffman.Cari@epa.gov](mailto:Shiffman.Cari@epa.gov)>; Rosemarie Kelley <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>; Karin Koslow <[Koslow.Karin@epa.gov](mailto:Koslow.Karin@epa.gov)>; Fogarty, Johnpc <[Fogarty.Johnpc@epa.gov](mailto:Fogarty.Johnpc@epa.gov)>; Amy Porter <[Porter.Amy@epa.gov](mailto:Porter.Amy@epa.gov)>; Buterbaugh, Kristin <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>; Bailey-Morton, Ethel <[Bailey-Morton.Ethel@epa.gov](mailto:Bailey-Morton.Ethel@epa.gov)>

**Subject:** Materials for Claire Murray SEP meeting

Attached are talking points and background materials for tomorrow's meeting with Claire Murray, on SEPs in state and local government cases.

**Ex. 5 AC/DP**

Just let us know if you have any questions.

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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---

**From:** Makepeace, Caroline

**Sent:** Tuesday, May 28, 2019 12:10 PM

**To:** Bodine, Susan <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>

**Cc:** Shiffman, Cari <[Shiffman.Cari@epa.gov](mailto:Shiffman.Cari@epa.gov)>; Rosemarie Kelley <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>; Karin Koslow <[Koslow.Karin@epa.gov](mailto:Koslow.Karin@epa.gov)>; Fogarty, Johnpc <[Fogarty.Johnpc@epa.gov](mailto:Fogarty.Johnpc@epa.gov)>; Amy Porter <[Porter.Amy@epa.gov](mailto:Porter.Amy@epa.gov)>; Buterbaugh, Kristin <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>

**Subject:** Advance copy of Revised Talking points for Claire Murray SEP meeting

Susan –

Cari suggested that, since time is tight, we share the attached “advance copy” of revised talking points to see if the new first set of bullets works for you, to reflect the conversation at the OCE general. And, to answer any questions you might have.

**Ex. 5 AC/DP**

5) a clean copy of the 1977 MOU with DOJ. And, of course, the talking points with any edits you'd like.

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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Talking Points for Meeting with PDAAG Murray on Application of the *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* to Supplemental Environmental Projects (SEPs) in Environmental Settlements

**Ex. 5 AWP/ AC / Ex. 7(A)**

**Ex. 5 AWP / AC / Ex. 7(A)**

**Ex. 5 AWP / AC / Ex. 7(A)**



**To:** Bailey-Morton, Ethel[Bailey-Morton.Ethel@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Shiffman, Cari[Shiffman.Cari@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]  
**From:** Makepeace, Caroline[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=27D7588025B3410F9C9459E6CF9C44A4-CMAKEPEA]  
**Sent:** Tue 5/28/2019 7:09:45 PM (UTC)  
**Subject:** RE: Materials for Claire Murray SEP meeting

I did just send you all some materials. They are attached to the original email at 2:57. However, per the note below, just got some comments from Larry on one piece (the first attachment, the talking points) so I will be making changes and resending that shortly. You can go ahead and make copies of all the other materials.

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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---

**From:** Bailey-Morton, Ethel  
**Sent:** Tuesday, May 28, 2019 3:06 PM  
**To:** Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Shiffman, Cari <Shiffman.Cari@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>  
**Subject:** RE: Materials for Claire Murray SEP meeting

Caroline,

Please provide copies to the IO office for this meeting tomorrow.

Thanks,  
Ethel

---

**From:** Makepeace, Caroline  
**Sent:** Tuesday, May 28, 2019 3:04 PM  
**To:** Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Shiffman, Cari <Shiffman.Cari@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Bailey-Morton, Ethel <Bailey-Morton.Ethel@epa.gov>  
**Subject:** RE: Materials for Claire Murray SEP meeting

Just got some feedback from Larry on the talkers, so will be tweaking that piece and re-sending.

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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---

**From:** Makepeace, Caroline  
**Sent:** Tuesday, May 28, 2019 2:57 PM

**To:** Bodine, Susan <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>  
**Cc:** Shiffman, Cari <[Shiffman.Cari@epa.gov](mailto:Shiffman.Cari@epa.gov)>; Rosemarie Kelley <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>; Karin Koslow <[Koslow.Karin@epa.gov](mailto:Koslow.Karin@epa.gov)>; Fogarty, Johnpc <[Fogarty.Johnpc@epa.gov](mailto:Fogarty.Johnpc@epa.gov)>; Amy Porter <[Porter.Amy@epa.gov](mailto:Porter.Amy@epa.gov)>; Buterbaugh, Kristin <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>; Bailey-Morton, Ethel <[Bailey-Morton.Ethel@epa.gov](mailto:Bailey-Morton.Ethel@epa.gov)>  
**Subject:** Materials for Claire Murray SEP meeting

Attached are talking points and background materials for tomorrow's meeting with Claire Murray, on SEPs in state and local government cases.

# Ex. 5 AC / AWP / Ex. 7(A)

Just let us know if you have any questions.

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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---

**From:** Makepeace, Caroline  
**Sent:** Tuesday, May 28, 2019 12:10 PM  
**To:** Bodine, Susan <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>  
**Cc:** Shiffman, Cari <[Shiffman.Cari@epa.gov](mailto:Shiffman.Cari@epa.gov)>; Rosemarie Kelley <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>; Karin Koslow <[Koslow.Karin@epa.gov](mailto:Koslow.Karin@epa.gov)>; Fogarty, Johnpc <[Fogarty.Johnpc@epa.gov](mailto:Fogarty.Johnpc@epa.gov)>; Amy Porter <[Porter.Amy@epa.gov](mailto:Porter.Amy@epa.gov)>; Buterbaugh, Kristin <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>  
**Subject:** Advance copy of Revised Talking points for Claire Murray SEP meeting

Susan –

Cari suggested that, since time is tight, we share the attached “advance copy” of revised talking points to see if the new first set of bullets works for you, to reflect the conversation at the OCE general. And, to answer any questions you might have.

# Ex. 5 AC / AWP / Ex. 7(A)

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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ED\_004082\_00000351-00002

and promptly delete.

**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**From:** Kelley, Rosemarie[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23B7C900323047FCA012DF62C58C4D22-RKELLEY]  
**Sent:** Wed 5/8/2019 4:07:03 PM (UTC)  
**Subject:** RE: updates

We'll put the Muni SEP issue on the agenda for tomorrow's Weekly.

Rosemarie

---

**From:** Starfield, Lawrence  
**Sent:** Wednesday, May 08, 2019 11:50 AM  
**To:** Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Subject:** updates

Spoke to Susan:

**Ex. 5 AWP / AC / Ex. 7(A)**

2. No news on LCR rule.

Larry  
This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

**To:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Bailey-Morton, Ethel[Bailey-Morton.Ethel@epa.gov]; Loving, Shanita[Loving.Shanita@epa.gov]; OECA-OCE-MANAGERS[OECAOCEMANAGERS@epa.gov]; OECASpecialAssistant[OECASpecialAssistant@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Johnson, Kathleen[Johnson.Kathleen@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]  
**From:** Buterbaugh, Kristin[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=760171C66D9E421EAB5D3FCB4356A1C0-BUTERBAUGH,]  
**Sent:** Wed 5/22/2019 7:48:02 PM (UTC)  
**Subject:** Agenda and Materials for May 23, 2019 OCE Weekly  
[Agenda - OCE Weekly 05 23 19 Weekly.pdf](#)

Good afternoon,

Please find the agenda and associated materials for tomorrow's OCE Weekly attached.

Thank you.

**Kristin Buterbaugh**

Special Assistant

OECA - Office of Civil Enforcement

U.S. Environmental Protection Agency

WJC South 3119C

1200 Pennsylvania Avenue, NW

Washington, DC 20460

(202) 564-4479

[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)

*This email may contain deliberative, attorney-client, attorney work product, or otherwise privileged material. Do not release under FOIA without appropriate review. If this email has been received by you in error, you are instructed to delete it from your machine and all storage media whether electronic or hard copy.*

**To:** Bodine, Susan[bodine.susan@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]  
**Cc:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]  
**From:** Fogarty, Johnpc[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]  
**Sent:** Wed 5/22/2019 12:55:04 PM (UTC)  
**Subject:** RE: Follow up on SEPs

Ex. 5 AC / Ex. 7(A)

**From:** Bodine, Susan  
**Sent:** Wednesday, May 22, 2019 8:49 AM  
**To:** Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Cc:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>  
**Subject:** RE: Follow up on SEPs

Got it. So, does that mean we should not raise it with Claire?

**From:** Fogarty, Johnpc  
**Sent:** Wednesday, May 22, 2019 8:49 AM  
**To:** Bodine, Susan <bodine.susan@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Cc:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>  
**Subject:** RE: Follow up on SEPs

Ex. 5 AC / Ex. 7(A)

**From:** Bodine, Susan  
**Sent:** Wednesday, May 22, 2019 8:40 AM  
**To:** Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Cc:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>  
**Subject:** RE: Follow up on SEPs

What about CSO policy?

**From:** Kelley, Rosemarie  
**Sent:** Tuesday, May 21, 2019 7:20 PM  
**To:** Bodine, Susan <bodine.susan@epa.gov>  
**Cc:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>  
**Subject:** Follow up on SEPs

Susan,

Ex. 5 AC / Ex. 7(A)

# Ex. 5 AC / Ex. 7(A)

Let us know if you would like to discuss further.

Rosemarie

Regards,  
Rosemarie A. Kelley, Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
202-564-4014

**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]  
**From:** Kelley, Rosemarie[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23B7C900323047FCA012DF62C58C4D22-RKELLEY]  
**Sent:** Mon 4/29/2019 5:15:17 PM (UTC)  
**Subject:** RE: SEP meeting with DOJ

**Ex. 5 AC/DP**

Larry –

We had some comments on your major points. Attached is a redline version and a clean version.

Let us know if you would like to discuss.

Rosemarie

---

**From:** Starfield, Lawrence  
**Sent:** Sunday, April 28, 2019 6:38 PM  
**To:** Bodine, Susan <bodine.susan@epa.gov>  
**Cc:** Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>  
**Subject:** SEP meeting with DOJ

Susan,

**Ex. 5 AC/DP**

For your consideration.

Larry

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**Topic:** The Jeff Sessions Memo (Nov. 2018) re: settlements with municipalities – EPA policy concerns.

# **Ex. 5 AC / AWP / Ex. 7(A)**

3. Long history of SEPs.

- a. First SEP policy was during the mid-1980's (Reagan/Bush Administrations) and has been embraced by every Administration since.
  - b. Many States have their own SEP policies in addition to the federal policy.
  - c. Cities and States are very supportive of the SEP policy.
    - i. No cities have complained about the existence of the SEP policy.
    - ii. The Environmental Council of States passed a resolution strongly supporting SEPs.
4. DOJ and EPA have put in place many "guard rails" to ensure that the SEP policy is not misused.
- a. Strong nexus requirement.
    - i. Addresses the same pollutant/impacts of concern as the violations.
    - ii. Project must be in geographic proximity to the violations.
  - b. Does not replace penalty
    - i. Penalty amount is not determined until *after* a SEP is agreed to/all terms of a settlement are fully agreed to.
    - ii. The SEP is merely a consideration in determining the appropriate penalty, along with other factors such as good faith negotiations, extent of harm to human health, repeat or first violation, etc.
  - c. Project is not one that is for the benefit of the defendant.
  - d. SEPs are designed to ensure compliance with all applicable federal financial laws (e.g., Miscellaneous Receipt Act, Anti-Deficiency Act, etc.).
    - i. No projects for work for which EPA or any entity is using or authorized to use federal funds to carry out.
  - e. SEPs are work undertaken by a defendant; payments to third parties are not allowed.
  - f. EPA may not play a role in managing or directing SEP projects.

**Ex. 5 AC / AWP / Ex. 7(A)**

**Ex. 5 AC / AWP / Ex. 7(A)**

**To:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Shiffman, Cari[Shiffman.Cari@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]  
**From:** Makepeace, Caroline[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=27D7588025B3410F9C9459E6CF9C44A4-CMAKEPEA]  
**Sent:** Tue 5/28/2019 4:10:15 PM (UTC)  
**Subject:** Advance copy of Revised Talking points for Claire Murray SEP meeting  
Talking Points for Meeting with PDAAG Claire Murray on Application of the Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State.5.28.2019.docx

Susan –

Cari suggested that, since time is tight, we share the attached “advance copy” of revised talking points to see if the new first set of bullets works for you, to reflect the conversation at the OCE general. And, to answer any questions you might have.

Later today we will be following up with:

- 1) the list of muni SEP examples (no changes);
- 2) the SEP fact sheet (also no changes);

3) 

**Ex. 5 AC/DP**

- 5) a clean copy of the 1977 MOU with DOJ. And, of course, the talking points with any edits you’d like.

Caroline Makepeace  
Senior Counsel  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

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**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Pollins, Mark[Pollins.Mark@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]  
**From:** Makepeace, Caroline[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=27D7588025B3410F9C9459E6CF9C44A4-CMAKEPEA]  
**Sent:** Thur 5/2/2019 5:08:01 PM (UTC)  
**Subject:** Re: Follow-Up Note on SEPs

Yay!

Sent from my iPhone

On May 2, 2019, at 1:06 PM, Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)> wrote:

Here it is!

Sent from my iPhone

Begin forwarded message:

**From:** "Bodine, Susan" <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>  
**Date:** May 2, 2019 at 1:02:28 PM EDT  
**To:** "jesse.panuccio@usdoj.gov" <[jesse.panuccio@usdoj.gov](mailto:jesse.panuccio@usdoj.gov)>  
**Cc:** "Clark, Jeffrey (ENRD)" <[jbc1@usdoj.gov](mailto:jbc1@usdoj.gov)>, "bruce.gelber@usdoj.gov" <[bruce.gelber@usdoj.gov](mailto:bruce.gelber@usdoj.gov)>, "Starfield, Lawrence" <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>  
**Subject:** Follow-Up Note on SEPs

Jesse,

Thank you for meeting with EPA on Tuesday and providing an explanation of Attorney General Sessions' *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (November 2018) and how that policy relates to EPA's SEP practice. I also appreciate your willingness to think further about these issues even as you prepare to depart DOJ. As you do, I thought it would be useful to provide you with some further thoughts on the concerns you raised, along with some examples of our municipal consent decrees and the types of SEP projects that have been included in those settlements.

**Ex. 5 AC/DP**

# Ex. 5 AC/DP

0

## Examples of SEPs with State and Local Governments

- **U.S. and State of Ohio v. City Middletown (CSO Settlement) –**
  - **Injunctive Relief:** 25-year implementation schedule; estimated cost of IR ~ \$250 million.
  - **SEP:** capping a specified area of sediments within the Hydraulic Canal; \$200,000; less than one year to complete.
- **U.S. and State of Indiana v. City of Gary (CSO & SSO Settlement) –**
  - **Injunctive Relief:** 25-year implementation schedule; estimated cost of IR is approximately \$100 million to \$300 million.
  - **SEP:** remove invasive plant species from a 19-acre area on the banks of the Grand Calumet; \$175,000; approximately two years to complete.
- **U.S. and Commonwealth of Massachusetts v. City of Haverhill (CSO and MS4 Settlement) –**
  - **Injunctive Relief:** 13-year implementation schedule; estimated cost of IR \$60 million.
  - **SEP:** riverbank restoration; \$176,000; approximately 2.5 years to complete.
- **U.S. v. Nevada DOT (MS4 Settlement) –**
  - **Injunctive Relief:** 2-year implementation schedule; estimated cost of IR ~ \$33 million.
  - **SEP:** real time monitoring of water quality data; \$200,000; less than two years to complete.
- **U.S. v. County of Westchester (SDWA Settlement) –**

- **Injunctive Relief:** 3-year implementation schedule; estimated cost of IR \$10 million.
- **SEP:** purchase rain barrels; increase number of days residents' unused household chemicals and pharmaceuticals will be accepted at defendants' recovery facility; \$691,000. For rain barrels, SEP completed when \$100,000 worth of rain barrels are distributed; for collection, 3 years to complete.
- **U.S. and State of Ohio v. City of Lima (CSO & SSO Settlement) –**
  - Injunctive Relief: 20-year implementation schedule; estimated cost of IR ~ \$147 million
  - SEP: revitalization of stream bank; \$218,000; less than one year to complete
- **U.S. and Intervenor Commonwealth of Massachusetts v. City of Fitchburg (CSO Settlement) –**
  - **Injunctive Relief:** 18-year implementation schedule; expected cost of IR approximately \$100 million.
  - **SEP:** stream bank stabilization; \$100,000; one year to complete.
- **U.S. and State of Iowa v. City Dubuque (SSO settlement)–**
  - **Injunctive Relief:** 5-year implementation schedule; estimated cost of IR \$5 million.
  - **SEP:** reconstruct 4 alleys using permeable interlocking concrete pavers; \$300,000; slightly more than three years to complete.

Thank you for your partnership with EPA during your time at DOJ.

Susan

Susan Parker Bodine  
 Assistant Administrator  
 Office of Enforcement and Compliance Assurance  
 202-564-2440

This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Pollins, Mark[Pollins.Mark@epa.gov]; Denton, Loren[Denton.Loren@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]; Gonzalez, Sarah[Gonzalez.Sarah@epa.gov]  
**From:** Makepeace, Caroline[O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=27D7588025B3410F9C9459E6CF9C44A4-CMAKEPEA]  
**Sent:** Thur 5/2/2019 4:15:58 PM (UTC)  
**Subject:** RE: Revised draft of follow-up note on muni SEPs -- FINAL DRAFT version 11  
[Follow up note on SEPs v.11.docx](#)

Larry –  
Sorry for this – but HERE is the best version – it reflects more information from DOJ that just now came in. This is the version to use.

Caroline Makepeace  
Senior Counsel  
Crosscutting Policy Staff  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

This may contain enforcement confidential or privileged material. Do not release without appropriate review. If you have received this message in error, please inform the sender, and promptly delete.

---

**From:** Makepeace, Caroline  
**Sent:** Thursday, May 02, 2019 12:08 PM  
**To:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Rosemarie Kelley <Kelley.Rosemarie@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Amy Porter <Porter.Amy@epa.gov>; Mark Pollins <Pollins.Mark@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Gonzalez, Sarah <Gonzalez.Sarah@epa.gov>  
**Subject:** RE: Revised draft of follow-up note on muni SEPs -- Completed QAQC

Larry et al.,  
Please use the attached , version 10. It reflects further QA/QC, on the last item noted below.

Caroline Makepeace  
Senior Counsel  
Crosscutting Policy Staff  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

This may contain enforcement confidential or privileged material. Do not release without appropriate review. If you have received this message in error, please inform the sender, and promptly delete.

---

**From:** Makepeace, Caroline  
**Sent:** Thursday, May 02, 2019 11:37 AM  
**To:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Rosemarie Kelley <Kelley.Rosemarie@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Amy Porter <Porter.Amy@epa.gov>; Mark Pollins <Pollins.Mark@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Gonzalez, Sarah <Gonzalez.Sarah@epa.gov>  
**Subject:** Revised draft of follow-up note on muni SEPs

Larry –  
  
Attached is a revised draft reflecting thoughts from Susan, you and DOJ.

We have scrambled to QA QC the examples and add in info about IR.

The only thing we have not been able to untangle is the Fitchburg case which has one \$100k SEP in the CD, but there is also an



appendix that notes another \$200k SEP, and our press materials are similarly inconsistent. This is highlighted in yellow in the draft. If we hear back from the Region we will let you know ASAP, but wanted to give you the option to retain or delete, notwithstanding that the list of examples is not super lengthy.

Let us know if any questions or further actions needed.

Caroline Makepeace  
Senior Counsel  
Crosscutting Policy Staff  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

This may contain enforcement confidential or privileged material. Do not release without appropriate review. If you have received this message in error, please inform the sender, and promptly delete.

**Draft Follow-Up Note on SEPs and the *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities***  
**5/2/19 Draft**

Thank you for meeting with us on Tuesday and providing an explanation of Attorney General Sessions' *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (November 2018) and how that policy relates to EPA's SEP practice. I also appreciate your willingness to think further about these issues even as you prepare to depart DOJ. As you do, I thought it would be useful to provide you with some further thoughts on the concerns you raised, along with some examples of our municipal consent decrees and the types of SEP projects that have been included in those settlements.

**Ex. 5 AC/DP**

# Ex. 5 AC/DP

## Examples of SEPs with State and Local Governments

- **U.S. and State of Ohio v. City Middletown (CSO Settlement) –**
  - **Injunctive Relief:** 25-year implementation schedule; Estimated cost of IR ~ \$250 million
  - **SEP:** capping a specified area of sediments within the Hydraulic Canal; \$200,000; less than one year to complete
- **U.S. and State of Indiana v. City of Gary (CSO & SSO Settlement) –**
  - **Injunctive Relief:** 25-year implementation schedule; Estimated cost of IR is approximately \$100 million to \$300 million
  - **SEP:** remove invasive plant species from a 19-acre area on the banks of the Grand Calumet; \$175,000; approximately two years to complete
- **U.S. and Commonwealth of Massachusetts v. City of Haverhill (CSO and MS4 Settlement) –**
  - **Injunctive Relief:** 13-year implementation schedule; Estimated cost of IR \$60 million
  - **SEP:** riverbank restoration; \$176,000; approximately 2.5 years to complete
- **U.S. v. Nevada DOT (MS4 Settlement) –**
  - **Injunctive Relief:** 2-year implementation schedule; Estimated cost of IR ~ \$33 million
  - **SEP:** real time monitoring of water quality data; \$200,000; less than two years to complete
- **U.S. v. County of Westchester (SDWA Settlement) –**
  - **Injunctive Relief:** 3-year implementation schedule; Estimated cost of IR \$10 million
  - **SEP:** purchase rain barrels; increase number of days residents' unused household chemicals and pharmaceuticals will be accepted at defendants' recovery facility; \$691,000; for rain barrels, SEP completed when \$100,000 worth of rain barrels are distributed; for collection, 3 years to complete
- **U.S. and State of Ohio v. City of Lima (CSO & SSO Settlement) –**
  - **Injunctive Relief:** 20-year implementation schedule; Estimated cost of IR ~ \$147 million
  - **SEP:** revitalization of stream bank; \$218,000; Less than one year to complete
- **U.S. and Intervenor Commonwealth of Massachusetts v. City of Fitchburg (CSO Settlement) –**

- **Injunctive Relief:** 18-year implementation schedule; Expected cost of IR approximately \$100 million
  - **SEP:** stream bank stabilization; \$100,000; one year to complete
- **U.S. and State of Iowa v. City Dubuque (SSO settlement)–**
  - **Injunctive Relief:** 5-year implementation schedule; Estimated cost of IR \$5 million
  - **SEP:** reconstruct 4 alleys using permeable interlocking concrete pavers; \$300,000; slightly more than three years to complete

**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**From:** Bodine, Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8C2CC6086FCC44C3BE6B5D32B262D983-BODINE, SUS]  
**Sent:** Thur 5/2/2019 12:44:01 PM (UTC)  
**Subject:** RE: Draft Follow-Up Note on SEPs  
[Follow up note on SEPs v.5.docx](#)

I agree – see edits

**From:** Starfield, Lawrence  
**Sent:** Thursday, May 2, 2019 8:32 AM  
**To:** Bodine, Susan <bodine.susan@epa.gov>  
**Subject:** RE: Draft Follow-Up Note on SEPs

Two more points for you to consider:

Ex. 5 AC/DP

Larry

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**From:** Starfield, Lawrence  
**Sent:** Thursday, May 02, 2019 8:16 AM  
**To:** Susan Bodine ([bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)) <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>  
**Subject:** FW: Draft Follow-Up Note on SEPs

Susan,

We’re still working on the note, but this is a very strong draft. Let me know if there are elements you’d like to add or subtract.

Larry

This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

**From:** Starfield, Lawrence  
**Sent:** Thursday, May 02, 2019 8:01 AM  
**To:** Kelley, Rosemarie <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>  
**Cc:** Fogarty, Johnpc <[Fogarty.Johnpc@epa.gov](mailto:Fogarty.Johnpc@epa.gov)>; Makepeace, Caroline <[Makepeace.Caroline@epa.gov](mailto:Makepeace.Caroline@epa.gov)>; Koslow, Karin <[Koslow.Karin@epa.gov](mailto:Koslow.Karin@epa.gov)>; Buterbaugh, Kristin <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>  
**Subject:** Fwd: Draft Follow-Up Note on SEPs

Rosemarie (and team),

This looks terrific. A couple of thoughts:

Ex. 5 AC/DP

# Ex. 5 AC/DP

Let me know what you think, and we can discuss with Susan.

Thanks for the fast and excellent effort.

Larry

Sent from my iPhone  
Begin forwarded message:

**From:** "Kelley, Rosemarie" <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>  
**Date:** May 1, 2019 at 8:39:01 PM EDT  
**To:** "Starfield, Lawrence" <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>  
**Cc:** "Fogarty, Johnpc" <[Fogarty.Johnpc@epa.gov](mailto:Fogarty.Johnpc@epa.gov)>, "Makepeace, Caroline" <[Makepeace.Caroline@epa.gov](mailto:Makepeace.Caroline@epa.gov)>, "Koslow, Karin" <[Koslow.Karin@epa.gov](mailto:Koslow.Karin@epa.gov)>, "Buterbaugh, Kristin" <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>  
**Subject:** Draft Follow-Up Note on SEPs

Larry –

Attached is a draft follow-up note for Susan to send to DOJ re: SEPs.

Rosemarie

Regards,  
Rosemarie A. Kelley, Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
202-564-4014

**Draft Follow-Up Note on SEPs and the *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities***

Thank you for meeting with us yesterday and providing an explanation of Attorney General Sessions' *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (November 2018) and how that policy relates to EPA's SEP practice. I also appreciate your willingness to think further about these issues even as you prepare to depart DOJ. As you do, I thought it would be useful to provide you with some further thoughts on the concerns you raised yesterday, along with some examples of our municipal consent decrees and the types of SEP projects that have been included in those settlements.

**Ex. 5 AC/DP**

# Ex. 5 AC/DP

## Below Examples of SEPs with State and Local Governments

- U.S. and State of Ohio v. City Middletown (combined sewer overflow (CSO) decree) – capping a specified area of sediments within the Hydraulic Canal; \$200,000; less than one year to complete
- U.S. and State of Indiana v. City of Gary (CSO decree) – remove invasive plant species from a 19-acre area on the banks of the Grand Calumet; \$175,000; approximately two years to complete
- U.S. and Commonwealth of Massachusetts v. City of Haverhill (? decree) – riverbank restoration; \$176,000; approximately \_\_\_\_\_ [We are having trouble locating the appendix that provides the length of time, so this one may need to come off]
- U.S. v. Nevada DOT (stormwater decree) – real time monitoring of water quality data; \$200,000; less than two years to complete [need app A]
- U.S. v. County of Westchester (? decree) – purchase rain barrels; increase number of days residents' unused household chemicals and pharmaceuticals will be accepted at defendants' recovery facility; \$691,000; for rain barrels, SEP completed when \$100,000 worth of rain barrels are distributed; for collection, 3 years to complete
- U.S. and State of Ohio v. City of Lima (CSO decree) – revitalization of stream bank; \$218,000; less than one year to complete [need app. F]

# Ex. 5 AC/DP

- U.S. and Intervenor Commonwealth of Massachusetts v. City of Fitchburg (? decree) – stream bank stabilization; \$100,000; one year to complete [this needs to be QA/QC'd because cd and appendix I have do not match]
- U.S. and State of Iowa v. City Dubuque (? decree) – reconstruct 4 alleys using permeable interlocking concrete pavers; \$300,000; slightly more than three years to complete



**To:** Bodine, Susan[bodine.susan@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]; Sullivan, Greg[Sullivan.Greg@epa.gov]; Saenz, Diana[Saenz.Diana@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]  
**Cc:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Branning, Hannah[Branning.Hannah@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]  
**From:** Fogarty, Johnpc[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]  
**Sent:** Thur 4/25/2019 8:41:13 PM (UTC)  
**Subject:** RE: Follow-up Items to OCE Weekly 4-25-19

OK, we heard the timeline but will pull together some examples.

**From:** Bodine, Susan  
**Sent:** Thursday, April 25, 2019 4:40 PM  
**To:** Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Sullivan, Greg <Sullivan.Greg@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>  
**Cc:** Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>; Branning, Hannah <Branning.Hannah@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Subject:** RE: Follow-up Items to OCE Weekly 4-25-19

I was looking for a few examples – including a timeline of how long it takes to settle these cases.

**From:** Fogarty, Johnpc  
**Sent:** Thursday, April 25, 2019 4:38 PM  
**To:** Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>; Sullivan, Greg <Sullivan.Greg@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>  
**Cc:** Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>; Branning, Hannah <Branning.Hannah@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Subject:** RE: Follow-up Items to OCE Weekly 4-25-19

Caroline and I heard something slightly different, that there wasn't a need for examples of SEPs in muni cases since those are well-known,

Ex. 5 AC/DP

**From:** Buterbaugh, Kristin  
**Sent:** Thursday, April 25, 2019 4:18 PM  
**To:** Sullivan, Greg <Sullivan.Greg@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>  
**Cc:** Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>; Branning, Hannah <Branning.Hannah@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Subject:** Follow-up Items to OCE Weekly 4-25-19

Good afternoon,

Here the follow-up items from today's OCE Weekly:

- 1. National Mining Association meeting

Ex. 5 AC/DP

- 2. SEP meeting

- OCE will send examples of municipal cases that include SEPs

- OCE will check:

Ex. 5 AC/DP

Please let me know if there are any questions. Thank you.

**Kristin Buterbaugh**

Special Assistant

OECA - Office of Civil Enforcement

U.S. Environmental Protection Agency

WJC South 3119C

1200 Pennsylvania Avenue, NW

Washington, DC 20460

(202) 564-4479

[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)

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**To:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov];  
Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Buterbaugh,  
Kristin[Buterbaugh.Kristin@epa.gov]  
**From:** Fogarty, Johnpc[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP  
(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]  
**Sent:** Mon 4/29/2019 7:14:41 PM (UTC)  
**Subject:** Examples of SEPs in municipal settlements, timeline and pipeline  
[Background on Municipal Settlements Including Supplemental Environmental Projects.4.29.19.docx](#)

Susan and Larry - in followup to the general on Thursday (and in advance of today's 5pm discussion w/DOJ), attached are materials covering the typical timeline for reaching settlements in CWA muni cases, along with short descriptions of several SEPs in recent cases, and

**Ex. 5 AC/DP**

**Ex. 5 AC/DP**

Thanks.

**Background on Municipal Settlements Including Supplemental Environmental Projects**  
**April 29, 2019**

**1. Typical Timeline for Municipal Settlements**

It can take, on average, 3-7 years to negotiate municipal settlements, with some cases taking over a decade. **Ex. 7(A)**

Early on, we focus on injunctive relief. The penalty and SEP discussions are usually the final part of the settlement, and can take months to negotiate.

**2. Examples of Municipal Settlements with SEPs**

CWA CSO CD with Middletown, OH (2018): The decree requires Middletown to perform a SEP involving the capping of a designated portion of the sediment bed in the hydraulic canal. These sediments have been impacted by historical industrial use of the hydraulic canal, and contain cadmium. Middletown's CSOs discharge a number of heavy metals, including cadmium, which increased risks to public health and aquatic life. The SEP will effectively eliminate exposure of benthic organisms to cadmium in impacted sediments, and such capping should also serve to minimize potential erosion and entrainment of impacted sediment downstream towards the Great Miami River. *See link for CD* <https://www.epa.gov/enforcement/middletown-ohio-clean-water-act-settlement>

CWA MS4 CD (with Nevada Department of Transportation (2016)): Nevada DOT SEP consists of upgrades to water quality monitoring devices to provide continuous water quality monitoring data and transmit the data in real-time to a central location to be uploaded to a publicly available platform, as well as provide real-time notifications to appropriate personnel when certain monitoring data and/or equipment operational thresholds are exceeded. Real-time data from continuous monitoring can be used to improve the understanding of temporal variances in hydrology and water quality and enhance effective water resource management, including improving the design and selection of stormwater BMPs. *See link for a copy of the CD* <https://www.epa.gov/enforcement/nevada-department-transportation-clean-water-settlement>

CWA CSO CD with Gary Sanitation District and Gary, Indiana (2018, lodged 12/2016 before recusal of original judge): Under the settlement, GSD and the City will implement SEPs that involve the removal of invasive plant species and restoration of native vegetation to stream banks and riparian areas in Northwest Indiana, including on the Grand Calumet River, a waterbody that has been impacted by the overflows from GSD and the City sewer system. The projects will deliver environmental benefits including improving habitats, eliminating an unnatural monoculture, preventing shoreline erosion, increasing stormwater retention, benefiting local hydrology and improving natural filtration of wet weather flows. *See link for a copy of the CD* <https://www.epa.gov/enforcement/gary-sanitary-district-and-city-gary-clean-water-settlement>

CWA CSO CD with Lancaster, PA (2017): The City will implement a SEP involving the daylighting and restoration of a segment of Groff's Run that is intended to restore approximately 1,350 linear feet of urban stream channel, reconnect wetlands to the Conestoga River, and establish additional habitat for micro- and macro-biota, enhancing the quality of the water impacted by the CSOs. The project will also

help reduce localized flooding from unmanaged impervious areas by providing additional stream capacity and flow rate attenuation above the confluence of the Conestoga River. *See link for a copy of the CD* <https://www.epa.gov/enforcement/city-lancaster-pa-clean-water-act-settlement>

CWA SSO CD with Fort Smith, Arkansas (2015): Fort Smith will perform a SEP to repair and replace leaking private laterals for low-income residential homeowners whom qualify for the program. The SEP will help to reduce the potential exposure of residents living in low-income portions of the city to raw sewage. *See link for a copy of the CD* <https://www.epa.gov/enforcement/city-fort-smith-arkansas-settlement>

**Ex. 7(A)**

**To:** Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; OKeefe, Susan[OKeefe.Susan@epa.gov]  
**From:** Makepeace, Caroline[O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=27D7588025B3410F9C9459E6CF9C44A4-CMAKEPEA]  
**Sent:** Wed 4/17/2019 2:25:23 PM (UTC)  
**Subject:** RE: SEP summaries, revised version  
Recent SEP Examples.4.17.19.docx

Susan and Larry –

The attached fixes a small, but potentially confusing, typo in the document.

Caroline Makepeace  
Senior Counsel  
Crosscutting Policy Staff  
Office of Civil Enforcement  
US Environmental Protection Agency  
202-564-6012

This may contain enforcement confidential or privileged material. Do not release without appropriate review. If you have received this message in error, please inform the sender, and promptly delete.

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**From:** Fogarty, Johnpc  
**Sent:** Tuesday, April 16, 2019 5:49 PM  
**To:** Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>  
**Subject:** SEP summaries

Susan and Larry – attached is a document that briefly describes a number of different SEPs that were included in recent cases. It is not intended to be comprehensive of all recent SEPs but is instead simply intended to illustrate the range of different projects included in various settlements under a variety of statutes.

Let us know if you want any additional information in preparation for the meeting on Friday.

---

**From:** Fogarty, Johnpc  
**Sent:** Monday, April 15, 2019 4:56 PM  
**To:** Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>  
**Subject:** Materials for discussion with DOJ on SEPs

Susan and Larry –

Attached are several materials in advance of the meeting with DOJ on Friday on SEPs.

First are two briefing papers (on SEPs and third-party payments), that were prepared by DOJ. These were just shared with us and we have not yet had a chance to review.

Second, also attached is a chart showing SEP annual results for the past ten years, and a copy of the current and consolidated SEP Policy (the “2015 Update”). We are also pulling together a variety of recent examples of SEPs which we will forward Wednesday, in advance of briefing you on all of this at the OCE general Thursday.

Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

Please let us know if you have any questions or would like other materials.

**To:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]  
**From:** Fogarty, Johnpc[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]  
**Sent:** Tue 4/16/2019 9:48:49 PM (UTC)  
**Subject:** SEP summaries  
[Recent SEP Examples.revd.docx](#)

Susan and Larry – attached is a document that briefly describes a number of different SEPs that were included in recent cases. It is not intended to be comprehensive of all recent SEPs but is instead simply intended to illustrate the range of different projects included in various settlements under a variety of statutes.

Let us know if you want any additional information in preparation for the meeting on Friday.

---

**From:** Fogarty, Johnpc  
**Sent:** Monday, April 15, 2019 4:56 PM  
**To:** Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
**Cc:** Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>  
**Subject:** Materials for discussion with DOJ on SEPs

Susan and Larry –

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# Ex. 5 Attorney Client (AC)

Please let us know if you have any questions or would like other materials.



**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**From:** Kelley, Rosemarie[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23B7C900323047FCA012DF62C58C4D22-RKELLEY]  
**Sent:** Wednesday, April 03, 2019 11:33:34 PM (UTC)  
**Subject:** RE: **Ex 7a**

**Ex. 5 AC/AWP/DP, Ex 7a**

Rosemarie

**From:** Starfield, Lawrence  
**Sent:** Wednesday, April 03, 2019 7:01 PM  
**To:** Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
**Subject:** FW: **Ex. 7(A)**

FYI.  
This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

**From:** Starfield, Lawrence  
**Sent:** Wednesday, April 03, 2019 7:01 PM  
**To:** Susan Bodine ([bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)) <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>  
**Subject:** **Ex. 7(A)**

Susan,

**Ex. 5 AC/AWP/DP, Ex 7a**

Larry  
This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

## **Ex. 6 Personal Privacy (PP)**

## **Ex. 6 Personal Privacy (PP)**

# **Ex. 6 Personal Privacy (PP)**

# **Ex. 6 Personal Privacy (PP)**

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
From: Kelley, Rosemarie[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23B7C900323047FCA012DF62C58C4D22-RKELLEY]  
Sent: Tue 10/1/2019 11:42:08 PM (UTC)  
Subject: RE: Ex. 5 AC/DP  
Ex. 7(A) 5 Summary 09 21 19 rak rev.docx

Larry –

I revised the version that Susan sent Claire. See attached.

Rosemarie

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
Sent: Tuesday, October 01, 2019 6:32 PM  
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
Subject: Ex. 5 AC/DP

Can you forward a corrected fact sheet to Ex. 5 AC/DP

Sent from my iPhone  
On Oct 1, 2019, at 1:59 PM, Kelley, Rosemarie <Kelley.Rosemarie@epa.gov> wrote:

Larry—

Ex. 5 AC/DP

Rosemarie

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>  
Sent: Friday, September 27, 2019 10:06 AM  
To: Bodine, Susan <bodine.susan@epa.gov>  
Cc: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>  
Subject: Ex. 5 AC/DP

Susan,

Ex. 5 AC/DP/7a

For your consideration. (I'm cc'ing Rosemarie in case she has additional suggestions.)

Larry

This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

\*\*\*\*\*

From: Susan Bodine

To: Claire Murray

Thru: Jeff Clark

# **Ex. 5 AC/DP/7a**

Please let me know if you would like to discuss this further. I appreciate your consideration of this request.

**To:** Bodine, Susan[bodine.susan@epa.gov]  
**Cc:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Sullivan, Greg[Sullivan.Greg@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]; Denton, Loren[Denton.Loren@epa.gov]; Theis, Joseph[Theis.Joseph@epa.gov]; Zimny, James[zimny.james@epa.gov]; King, Carol[King.Carol@epa.gov]; Rog, Morgan[Rog.Morgan@epa.gov]  
**From:** Pollins, Mark[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=591F52A6CC074A2394FB5DDC306C2FD7-MPOLLINS]  
**Sent:** Wed 3/20/2019 2:23:26 PM (UTC)  
**Subject:** Ex. 7(A)  
Ex. 7(A) 3-19-19.docx

As requested Ex. 5 AC/AWP/DP, Ex 7a

Mark

Mark Pollins, Director  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance (OECA)  
U.S. Environmental Protection Agency  
Phone: (202) 564-4001  
Fax: (202) 564-0018

**To:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**Cc:** Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]  
**From:** Fogarty, Johnpc[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]  
**Sent:** Mon 4/15/2019 8:55:44 PM (UTC)  
**Subject:** Materials for discussion with DOJ on SEPs  
[FINAL 2015 UPDATE TO SEP POLICY.pdf](#)  
[sep annual results graph.pdf](#)  
[LPS-#268841-v1-TPP Briefing Paper 041519 External \(002\).DOCX](#)  
[LPS-#268842-v1-SEPs Briefing Paper 041519 External \(002\).DOCX](#)

Susan and Larry –

Attached are several materials in advance of the meeting with DOJ on Friday on SEPs.

First are two briefing papers (on SEPs and third-party payments), that were prepared by DOJ. These were just shared with us and we have not yet had a chance to review.

Second, also attached is a chart showing SEP annual results for the past ten years, and a copy of the current and consolidated SEP Policy (the “2015 Update”). We are also pulling together a variety of recent examples of SEPs which we will forward Wednesday, in advance of briefing you on all of this at the OCE general Thursday.

# Ex. 5 AC/DP

Please let us know if you have any questions or would like other materials.



**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]  
**Cc:** Shiffman, Cari[Shiffman.Cari@epa.gov]; Mirza, Sabah[Mirza.Sabah@epa.gov]  
**From:** Bodine, Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8C2CC6086FCC44C3BE6B5D32B262D983-BODINE, SUS]  
**Sent:** Fri 9/27/2019 8:55:21 PM (UTC)  
**Subject:** FW: SEP **Ex. 5 AC/AWP/DP**  
**Ex. 7(A)** Summary 09 21 19.docx  
**Ex. 7(A)** Summary 09 21 19.docx

For your files.

Susan

**From:** Bodine, Susan  
**Sent:** Friday, September 27, 2019 4:43 PM  
**To:** Clark, Jeffrey (ENRD) <jbc1@usdoj.gov>  
**Subject:** SEP **Ex. 5 AC/DP**

Jeff,

**Ex. 5 AC/AWP/DP**

Susan

Susan Parker Bodine  
Assistant Administrator  
Office of Enforcement and Compliance Assurance  
202-564-2440

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\*\*\*\*\*

**From:** Susan Bodine  
**To:** Claire Murray  
**Thru:** Jeff Clark

**Ex. 5 AC/AWP/DP**

# **Ex. 5 AC/AWP/DP**

Please let me know if you would like to discuss this further. I appreciate your consideration of this request.

## **SUPPLEMENTAL ENVIRONMENTAL PROJECTS (SEPs) IN CASES INVOLVING STATE AND LOCAL GOVERNMENTS**

### **BACKGROUND:**

- **Supplemental Environmental Projects (SEP)** are projects that a defendant volunteers to undertake in settlement that provide additional environmental benefits by reducing human health exposures or environmental impacts or by reducing the likelihood of future violations. EPA considers SEPs when setting penalty demands.
- Examples of SEPs include lead-based paint abatement for low-income housing in the vicinity of a facility with Clean Air Act violations involving lead emissions; purchase of emergency response equipment for the community in which a defendant has violated the Clean Air Act risk management program; and emissions or discharge reductions at a defendant's facility beyond that which is required by law.
- EPA first issued the SEP Policy in 1991, formalizing the practice of including environmentally beneficial projects in settlements starting in the mid-1980s. The practice of allowing SEPs has been reviewed and approved both by EPA's Office of General Counsel and DOJ's Office of Legal Counsel. EPA most recently updated its SEP policy in 2015. Under EPA's policy, a SEP cannot require a payment to a third party.
- In August 2019, DOJ's Enforcement and Natural Resources Division issued a memorandum expressly disallowing the inclusion of SEPs in cases against governmental entities, except for diesel emission reduction SEPs, that are expressly authorized by Congress, and some other limited potential exceptions. The memorandum also signals that SEPs are not likely to be approved in any settlement, whether with a governmental or private party.

### **TALKING POINTS:**

- SEPs are a lawful exercise of EPA's enforcement discretion. EPA supports SEPs not only because of their additional positive environmental benefits, but also because they are useful in achieving settlements.
- EPA's SEP Policy is unchanged and still in effect. The Agency continues to support the inclusion of SEPs that meet all the requirements of its SEP Policy in appropriate cases.
- DOJ's policies apply to judicial matters. EPA continues to include SEPs in administrative settlements, including those with governmental entities.

**To:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]  
**Cc:** Mirza, Sabah[Mirza.Sabah@epa.gov]  
**From:** Shiffman, Cari[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=645F74D11EEC4EBA9337CB5734AD6098-SHIFFMAN, CARI]  
**Sent:** Tue 9/17/2019 9:53:24 PM (UTC)  
**Subject:** Fact Sheets for Tomorrow's Hearing Prep  
[Regional Issue Papers](#)  
[List of Member Sites by Region](#)  
[OECA Fact Sheets- final versions](#)

Susan,  
OAP assembled these all into a binder for you which is on your chair.

Thanks,

Cari Shiffman, Chief of Staff  
U.S. Environmental Protection Agency  
Office of Enforcement and Compliance Assurance  
Office: (202) 564-2898 | Mobile: (202) 823-3277

**To:** Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**From:** Kelley, Rosemarie[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23B7C900323047FCA012DF62C58C4D22-RKELLEY]  
**Sent:** Wed 8/28/2019 1:00:47 AM (UTC)  
**Subject:** Re: DOJ just issued a new memo on Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments

Occasionally.

Rosemarie

On Aug 27, 2019, at 8:02 PM, Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)> wrote:

You are fast!

Sent from my iPhone

On Aug 27, 2019, at 7:51 PM, Kelley, Rosemarie <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)> wrote:

All --

Here is the desk statement we developed to respond to questions about DOJ's new policy on SEPs:

Questions regarding DOJ's 8/21/19 policy on supplemental environmental projects (SEPs) should be directed to DOJ's Office of Public Affairs. A SEP is a voluntary beneficial environmental project that goes beyond compliance requirements and that is taken into consideration by the government when setting an appropriate penalty amount. EPA has not changed its 2015 policy regarding SEPs in settlement agreements and will continue to support SEPs in administrative cases.

The OECA communications director will share it with your PADs but I want to make sure you have it as well.

Rosemarie Kelley, Director

Office of Civil Enforcement

OECA

---

**From:** Kelley, Rosemarie  
**Sent:** Wednesday, August 21, 2019 1:54 PM  
**To:** Regional Counsels and Deputies <[Regional\\_Counsels\\_and\\_Deputies@epa.gov](mailto:Regional_Counsels_and_Deputies@epa.gov)>; OECA-OCE-MANAGERS <[OECAOCEMANAGERS@epa.gov](mailto:OECAOCEMANAGERS@epa.gov)>; Makepeace, Caroline <[Makepeace.Caroline@epa.gov](mailto:Makepeace.Caroline@epa.gov)>; ECAD Directors and Deputies <[ECAD\\_Directors\\_and\\_Deputies@epa.gov](mailto:ECAD_Directors_and_Deputies@epa.gov)>; OECA Office Directors and Deputy Directors <[OECA\\_Office\\_Directors\\_and\\_Deputy\\_Directors@epa.gov](mailto:OECA_Office_Directors_and_Deputy_Directors@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Susan Bodine ([bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)) <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>

ED\_004082\_00000796-00001

**Cc:** Buterbaugh, Kristin <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>; Shiffman, Cari <[Shiffman.Cari@epa.gov](mailto:Shiffman.Cari@epa.gov)>; Mirza, Sabah <[Mirza.Sabah@epa.gov](mailto:Mirza.Sabah@epa.gov)>

**Subject:** RE: DOJ just issued a new memo on Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments

I apologize for not including the link. Here it is:

<https://www.justice.gov/enrd/page/file/1197056/download>

---

**From:** Kelley, Rosemarie

**Sent:** Wednesday, August 21, 2019 1:26 PM

**To:** Regional Counsels and Deputies <[Regional\\_Counsels\\_and\\_Deputies@epa.gov](mailto:Regional_Counsels_and_Deputies@epa.gov)>; OECA-OCE-MANAGERS <[OECAOCEMANAGERS@epa.gov](mailto:OECAOCEMANAGERS@epa.gov)>; Makepeace, Caroline <[Makepeace.Caroline@epa.gov](mailto:Makepeace.Caroline@epa.gov)>; ECAD Directors and Deputies <[ECAD\\_Directors\\_and\\_Deputies@epa.gov](mailto:ECAD_Directors_and_Deputies@epa.gov)>; OECA Office Directors and Deputy Directors <[OECA\\_Office\\_Directors\\_and\\_Deputy\\_Directors@epa.gov](mailto:OECA_Office_Directors_and_Deputy_Directors@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Susan Bodine ([bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)) <[bodine.susan@epa.gov](mailto:bodine.susan@epa.gov)>

**Cc:** Buterbaugh, Kristin <[Buterbaugh.Kristin@epa.gov](mailto:Buterbaugh.Kristin@epa.gov)>

**Subject:** DOJ just issued a new memo on Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments

All—

I want to let you know that DOJ just issued a memo on Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments minutes ago.

More to come on next steps, but I thought you should know about this memo.

Rosemarie

Regards,

Rosemarie A. Kelley, Director

Office of Civil Enforcement

Office of Enforcement and Compliance Assurance

202-564-4014

ED\_004082\_00000796-00002



**To:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Hull, George[Hull.George@epa.gov]  
**From:** Egan, Patrick[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A8AF6E75E84A463A935E3A70BA72D043-PEGAN]  
**Sent:** Fri 9/6/2019 12:25:04 PM (UTC)  
**Subject:** National Law Review Article Regarding DOJ's SEP Policy Published Yesterday  
The National Law Review - New DOJ Policy Diminishes Use of SEPs in Federal Settlements with State and Local Governments - 2019-09-05.pdf

# New DOJ Policy Diminishes Use of SEPs in Federal Settlements with State and Local Governments

Article By:  
John C. Cruden  
Allyn L. Stern  
Andrew C. Silton  
Sarah N. Munger

On August 21, Jeffrey Clark, the Assistant Attorney General (AAG) for the Environment and Natural Resources Division, issued a [memorandum](#) diminishing state and local governments' ability to use supplemental environmental projects (SEPs)--environmentally beneficial projects that are not otherwise required by law--in settlements of federal environmental enforcement actions. The memorandum allows consent decrees and settlement agreements between the Department of Justice (DOJ) and state and local government entities to include SEPs only under extremely narrow circumstances. It further signals that DOJ is continuing to review whether SEPs may be used at all in settlements resolving civil environmental enforcement actions.

The memorandum specifically applies a [November 2018 DOJ policy](#) that restricted the federal government from entering consent decrees and settlements with state and local governments that "achieve general policy goals or []extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment." In its latest memorandum, DOJ determined that SEPs generally fall within this prohibition.

In support of its new policy on SEPs in cases involving state and local governments, DOJ raised concerns that SEPs lack direct congressional authorization and threaten congressional prerogatives, as well as those of state and local government entities. DOJ has further determined that America's Water Infrastructure Act of 2018 (AWIA), Pub. L. No. 115-270, 132 Stat. 3765, did not authorize the use of SEPs in settlements of Clean Water Act enforcement cases brought against municipal entities. The AWIA explicitly authorized the use of integrated plans to coordinate and streamline the Clean Water Act compliance obligations of local entities operating publicly owned treatment works and storm sewer systems, both in permits and in the resolution of enforcement actions. DOJ concluded, however, that the AWIA should not be read to authorize SEPs in settlements with local entities.

Having concluded that SEPs fall within the prohibitions in DOJ's November 2018 policy, the memorandum indicates that AAG Clark will be conducting a broader review of the availability of SEPs in civil enforcement actions. In the interim, the memorandum requires that SEPs with state and local entities must comply with the following limitations, in addition to those set out in existing policies:

- "The SEPs must be discrete projects representing a small component of the overall settlement in terms of duration, dollars, and scope of work;"



- SEPs should only be part of a settlement “as a matter of last resort.” If a SEP was negotiated before the November 2018 policy, a request for settlement authorization must demonstrate that the SEP cannot be removed “without jeopardizing the agreement or harming the interests of the United States.” If a SEP was negotiated after the November 2018 policy, a request for settlement authorization “must demonstrate that the settlement would not be possible without the inclusion of SEPs;”
- “The SEPs should provide broad benefits to the community, and not individuals;” and
- “The governmental defendant should certify that the SEPs do not violate any direct or implied restriction imposed by local, state or federal law.”

Even if a SEP meets all of these conditions, AAG Clark cautioned that exceptions “are meant to be rare.”

For over 25 years, SEPs have been used to effectuate productive settlement negotiations and have been a popular and useful mechanism for resolving protracted litigation. While SEPs are not considered penalty payments, nor are they agreed upon in lieu of penalties, the investment in a SEP is considered by EPA and DOJ in exercising their discretion to calculate a penalty. Although SEPs may not always be the most practical choice for a defendant, their use has helped realize significant social and environmental benefits in communities across the country. DOJ’s memorandum not only narrows the scope of settlement options in federal civil enforcement actions, but it also impacts those communities that would otherwise benefit from SEPs.

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Patrick J. Egan, M.P.A.  
 Deputy Director of Communications  
 Office of Enforcement and Compliance Assurance  
 U.S. Environmental Protection Agency  
 1200 Pennsylvania Avenue NW (MC: 2201A)  
 Washington, DC 20460  
 Office: 202-564-4059 | Cell: 202-440-3883

# New DOJ Policy Diminishes Use of SEPs in Federal Settlements with State and Local Governments



Article By

[John C. Cruden](#)

[Allyn L. Stern](#)

[Andrew C. Sifton](#)

[Sarah N. Munger](#)

[Beveridge & Diamond PC](#)

[Client Alert--Beveridge and Diamond](#)

- [Administrative & Regulatory](#)
- [Environmental, Energy & Resources](#)
- [All Federal](#)
- [All States](#)

Thursday, September 5, 2019

On August 21, Jeffrey Clark, the Assistant Attorney General (AAG) for the Environment and Natural Resources Division, issued a [memorandum](#) diminishing state and local governments' ability to use supplemental environmental projects (SEPs)—environmentally beneficial projects that are not otherwise required by law—in settlements of federal environmental enforcement actions. The memorandum allows consent decrees and settlement agreements between the Department of Justice (DOJ) and state and local government entities to include SEPs only under extremely narrow circumstances. It further signals that DOJ is continuing to review whether SEPs may be used at all in settlements resolving civil environmental enforcement actions.

The memorandum specifically applies a [November 2018 DOJ policy](#) that restricted the federal government from entering consent decrees and settlements with state and local governments that “achieve general policy goals or [ ]extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.” In its latest

memorandum, DOJ determined that SEPs generally fall within this prohibition.

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- SEPs should only be part of a settlement "as a matter of last resort." If a SEP was negotiated before the November 2018 policy, a request for settlement authorization must demonstrate that the SEP cannot be removed "without jeopardizing the agreement or harming the interests of the United States." If a SEP was negotiated after the November 2018 policy, a request for settlement authorization "must demonstrate that the settlement would not be possible without the inclusion of SEPs;"
- "The SEPs should provide broad benefits to the community, and not individuals;" and
- "The governmental defendant should certify that the SEPs do not violate any direct or implied restriction imposed by local, state or federal law."

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**Source URL:** <https://www.natlawreview.com/article/new-doj-policy-diminishes-use-seps-federal-settlements-state-and-local-governments>

**To:** Martinez, Isidra[Martinez.Isidra@epa.gov]  
**Cc:** Bodine, Susan[bodine.susan@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]  
**From:** Mirza, Sabah[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=816BF1F9B67D4892BDAC00DE2EABDA3F-MIRZA, SABAH]  
**Sent:** Tue 8/27/2019 6:22:54 PM (UTC)  
**Subject:** Prints for Larry and Susan before leaving R5  
Agenda ECAD Director Agenda 9 11-12 2019 Ver 8 - Final - 8 27 2019.docx  
ED RC August 2019 V3 FOR SLP.pdf

Hi Isidra,

Please print the following and make two copies each for Susan and Larry.

- 1. Agenda ECAD Director Agenda 9 11-12.....docx
- 2. ED RC August 2019 for SLP.pdf

Thanks,  
Sabah

~~~~~  
Sabah Mirza, Special Assistant  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW, 3207E WJC South  
Washington, DC 20460  
Office: 202-564-8176

## AGENDA

### 1) General Updates (15 min)

- **Topic Leader:** Susan Bodine, OECA
- **Description:** Sharing new developments and general updates with the EDs/RCs.
  - Circuit Rider Proposal
  - VTC Feedback
  - Focus on End-of-Year
  - SEPs

## Ex. 5 Deliberative Process (DP)

Questions regarding DOJ's 8/21/19 policy on supplemental environmental projects (SEPs) should be directed to DOJ's Office of Public Affairs. A SEP is a voluntary beneficial environmental project that goes beyond compliance requirements and that is taken into consideration by the government when setting an appropriate penalty amount. EPA has not changed its 2015 policy regarding SEPs in settlement agreements and will continue to support SEPs in administrative cases.

### 2) Regional Roundtable (20 min)

- Any hot issues/sensitive or controversial filings in the next 2-3 weeks.

### 3) ECAD Meeting Discussion (15 min)

- **Topic Leader:** Larry Starfield, OECA
- **Description:** Discussion of the ECAD agenda.
- **Objective:** To review and finalize the agenda.

### 4) Senior Inspector GS-13 Level (10 min)

- **Topic Leader:** Kathleen Johnson, OECA
- 

## Ex. 5 Deliberative Process (DP)

- **Objective:** To look at options for facilitating the number of regional inspectors that are classified at the GS-13 level.
- **Materials:** Inspector GS-13 Level Briefing Paper.

### 5) Regional Support Contract (10 min)

- **Topic Leader:** Amy Miller, Region 9
- **Description:** Discussion on regionally-led support contract.
- **Objective:** To solicit comments and feedback from the EDs/RCs on creating a regionally-led support contract for implementing regional ECAD priorities for FY2020-2021 budget cycles.

Joint Enforcement Directors and Regional Counsel Monthly Video Teleconference

August 28, 2019, 2:00-3:30 pm Eastern Time

Headquarters: WJC South Room 5213

Ex. 6 Personal Privacy (PP)

**6) Update on NCI expectations for 2020 (10 min)**

- **Topic Leader:** David Hindin, OC
- **Description:** Provide regions with an overview of the Partial NCI Draft Strategy draft compilation that were sent to them by Larry Starfield on August 26. These partial strategies provide regions with OECA's expectations for regional engagement in the 6 NCIs in FY2020.
- **Objective:** Help regions understand how to use these draft partial NCI strategies in developing their FY2020 Regional Strategic Plans (which are due to OECA by September 6).

**7) Bowling Chart (10 min)**

- **Topic Leader:** Michele McKeever, OC
- **Description:** Proposal of two-month lag for certain monthly measures and submission of FY 2020 measures. Summary/report out from the last OECA Monthly Business meeting.
- **Objective:** Share August bowling chart activities.
- **Materials:** OECA August 2019 Bowling Chart and Key Highlights.

Inspector GS-13 Level  
Briefing Paper for Larry Starfield and Ed Chu

**Issue:** What are the options for facilitating the number of regional inspectors that are classified

## **Ex. 5 Deliberative Process (DP)**



## **Ex. 5 Deliberative Process (DP)**

## **Ex. 5 Deliberative Process (DP)**



# Ex. 5 Deliberative Process (DP)

# **Ex. 5 Deliberative Process (DP)**

OECA Bowling Chart Update (Monthly Business Meeting)  
August 13, 2019  
Key Highlights and Issues

We will spend monthly business meeting focusing on:

**Ex. 5 Deliberative Process (DP)**

**General**

**Ex. 5 Deliberative Process (DP)**

**B01/RM.E03:** Increase compliance in the Clean Water Act National Pollutant Discharge Elimination System (NPDES) by reducing the percentage of permittees in significant noncompliance with their permit.

- No new data this month.

**Ex. 7(E)**

- A memorandum from the OECA AA to the Regional Administrators outlining expectations for the role of the regions in the SNC NCI rate reduction effort was signed by Susan on July 12, 2019. The memorandum

asks the regions to focus efforts at reducing the NPDES SNC rate in four areas: 1) meet quarterly with each authorized state regarding SNC, 2) work with each authorized state to improve accuracy and completeness of compliance data in ICIS, 3) identify best practices for reducing the SNC rate and deterring and addressing SNC violations, and 4) develop a written plan for how the region will reduce the SNC rate in each direct implementation areas.

- The NCI Executive Board named a SIT Steering Committee for the SNC NCI and has identified volunteers for the SIT. Dan Palmer, Deputy Director, OC/PMOD, was elected chairman of the Steering Committee. The Steering Committee developed and submitted a draft of the initial sections of the NCI Implementation Strategy to the NCI Executive Board on August 2, outlining activities and measures for the NCI. The Steering Committee will continue developing the formal NCI Implementation Strategy over the summer.
- OC is putting funds toward an OW cooperative agreement with ACWA to fund AWCA support in 2020 and 2021 for the SNC NCI and for a second EPA-state SNC conference (with up to 30 states, including non-workgroup states, attending). Some funding also is available to help states travel to observe/learn another state's or EPA region's best practice for reducing SNC.

## Ex. 7(E)

- OC is developing a variety of webinars in support of this NCI, primarily covering definition of SNC, technical assistance for small POTWs and possibly other small facilities, compliance data quality and quality review, and best practices topics. Two ICIS-NPDES training webinars were held in July and recorded for on-demand viewing. A webinar on a topic particularly requested by states, "Understanding EPA's CWA-NPDES Significant Noncompliance National Compliance Initiative," is scheduled for August 28.

**B02/RM.E04:** Number of currently-documentable EPA administrative enforcement actions or activities producing correction of violations.

- OECA did not set targets for this measure.
- In Phase 1 (October – November 2018), we reported on Expedited Settlement Actions (ESAs) and Self-Disclosures (reported to ICIS and e-Disclosure).
- Phase 2 (current), includes Phase 1 plus FAPOs that include a certification of compliance (tracked in ICIS as "certificate of compliance") and we are piloting the reporting of other enforcement actions or activities that result in a certification of compliance. Pursuant to a meeting with the OECA AA, we will not report the number of violations corrected previously proposed as Phase 3 due to the complex nature of the task and the resources that would be required.
- Proposal to OCFO for FY 2020 is to discontinue the VC measure because it is not a useful management tool and because the regions and OECA are already doing many things to reduce the time from violation identification to correction. Information was shared with Susan about how the regions and OECA have made strides in improving the time from violation identification to correction and she agreed that the measure should be discontinued.

**S01/RM.E01:** Number of EPA on-site compliance monitoring inspections/evaluations conducted by credentialed EPA inspectors in direct implementation states, territories, and Indian country and in authorized states, territories, and Indian country. Note: Data will also be used for inspection report timeliness measure (S05/RM.E07).

- Quarterly measure, will report next on Q4 inspections in October Bowling Chart

**S02/RM.E02:** Number of EPA on-site compliance monitoring inspections/evaluations conducted by credentialed EPA inspectors in direct implementation states, territories, and Indian country and in authorized states, territories, and Indian country in support of National Compliance Initiatives (NCIs) per its implementation strategy. (cumulative)

- Quarterly measure, will report next on Q4 inspections in October Bowling Chart

**S03/RM.E05:** Number of drinking water priority systems addressed with a formal enforcement action or resolved.

- The regions' ability to meet FY 20 SDWA targets will be strained by diversion of resources to implement the SDWA NCI.
- We will use the NCI process to develop new measures that assess effectiveness of the SDWA DW NCI activities.

**S04/RM.E06:** Reduce the number of all open civil judicial cases that are more than 2.5 years old without a complaint filed<sup>1</sup>.

- In June, the number of RNCF cases dropped from 106 to 103. In July, the number remained the same at 103.
- The Measure Leads finalized an OCE pilot to improve the pace of cases in general. Beginning in July 2019, OCE began to participate in Regional Dockets (or schedule separate calls as needed) and meet with OCE Divisions (for HQ lead cases) for a focused discussion on the status of referred matters over 2.5 years old. The goal of these meetings is to either reach an agreed upon plan for moving the most challenging cases (i.e., cases over 2.5 years old and/or other cases as identified by the region) to conclusion or elevating the case in order to address the issues that have caused the referral to stagnate.
- The OCFO "3 greens" policy applies to the RNCF metric. After discussion of the "3 greens" policy with OECA's senior leadership, OCE adjusted the national target downward from  $\leq 129$  to a proposed target of  $\leq 120$ . The new target of  $\leq 120$  is in effect as of the July bowling chart.

**S05/RM.E07:** Percentage of EPA inspection reports that are timely completed and communicated to the regulated entity within 70 days from the date of the inspection.

- OECA management is still evaluating recommendations from the ICIS timeliness workgroup. Modifications will be made to the ICIS report select logic to improve the accuracy of the monthly Bowling Chart results. Other recommendations will require longer term effort and more discussion. Two different memos are currently being drafted regarding improving the ICIS report for the measure: one is on establishing better baseline information for on-site inspections, and the other is on future improvements to the ICIS report itself.
- OC continues to face resistance from some regional program managers who refuse to enter timeliness data into ICIS. This is because either their program's database of record for inspections is not ICIS, they do not want the burden of entering these inspections and the inspection timeliness data into ICIS, or their inspection processes and timelines do not align with OECA's. These include inspections programs such as RCRA, SDWA and UIC. OC will continue discussions with program managers on these issues.
- NEIC completed 75% of civil inspection reports due in July 2019 within 60 days.

**S06/RM.E08:** Percentage of State Review Framework Round 3 recommendations that have been implemented (both timely and late).

- In July, EPA reported the close out of 10 additional SRF recommendations, just below the target of 11 for the month. EPA is still ahead of pace to meet the fiscal year target of 76%, having now completed 75.3% (478 out

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<sup>1</sup> Note that these cases are referred to as "referred, no complaint filed" or RNCF.



of 635) of SRF recommendations from all finalized Round 3 reports. Twenty-two percent (21%) of recommendations are overdue (past their scheduled completion date), while 4% remain in progress.

- Regional SRF recommendation completion rates vary from 64% to 86%. It is important to note here, though, that the total number of recommendations issued by each region also varies significantly and this is a contributing factor in the percentage completed variation.
- All SRF Round 3 reports were scheduled to be completed by December 31, 2017. To date, two reports still need to be finalized; one of the reports in Region 8 has been waiting for Regional senior management signature for over 11 months. Unfinished reviews/reports and their status are provided in the table below.

| Region | State | ACS Commit. | Status of Round 3 Reviews                               |
|--------|-------|-------------|---------------------------------------------------------|
| 5      | OH    | FY17        | Draft report with the state for 45-day review           |
| 8      | SD    | FY17        | Final report waiting for R8 senior management signature |

**S07:** Number of potentially responsible party (PRP) and other party commitments to perform or pay for cleanup and/or re-use of contaminated sites.

- OSRE/FFEO did not meet the monthly target for July, the month is “red”.
- However, please note the previously reported month of June went from “red” to “yellow” and October’s result was revised from 10 to 11. Since the data pulls are so close to the end of the month, the actual accomplishments for a given month may not be updated and reflected in our totals until the next monthly reporting cycle. We are assuming we may continue to see increases in past month’s reported numbers through the end of the fiscal year accomplishments reporting cycle.
- Additionally, the government shutdown will likely affect our overall monthly accomplishments since, in some cases, regions were unable to bring negotiations to a close and/or finalize settlement agreements and/or issue final FF RODs as anticipated.
- The 5-year baseline average that was developed for the FY19 measure totaled 169, which we rounded up to 170 for the FY19 annual target. However, the data also shows a significant decrease in enforcement accomplishments between FY14-FY18. For example, Federal Facility RODs, ROD Amendments, ESDs and FFAS decreased by 50% (82 in FY14 vs. 41 in FY18:) and RCRA CA orders are down by 82% (22 in FY14 vs. 4 in FY18). It is difficult to know whether the last two fiscal years are the new norm for our workload or are anomalies.
- For FY20, the proposal is to keep the same FY19 bowling chart measure but decrease the target from 170 to 135.

**Ex. 7(E)**

management are taking an active role in project planning and project management to train and mentor staff.

**S10:** Percentage of criminal cases having the most significant health, environmental, and deterrence impacts.

- The number of open cases and results remained steady. No major changes this month to report.

#### AGENCY-WIDE MEASURES

- For the measures for which we have data, the only one in the red for this month is A12 – *Percent of travel vouchers not approved by supervisors within 5 days* (5/159 from 0/50 last month).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 10 2015

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy

FROM: Cynthia Giles  
Assistant Administrator *Cynthia Giles*

TO: Regional Administrators

I am pleased to issue the 2015 Update to the EPA Supplemental Environmental Projects Policy (Update or 2015 Update), which reflects and incorporates by reference all of the guidance and implementation decisions made about Supplemental Environmental Projects (SEPs) since the issuance of EPA's SEP Policy in 1998. This Update supersedes the 1998 Policy, and is effective immediately.

Consolidating the wealth of existing SEP guidance is intended to encourage use of the Policy by helping facilitate and streamline the inclusion of SEPs in civil enforcement settlements whenever appropriate. The 2015 Update is also intended to underscore the Agency's continuing strong support for SEPs, which can be powerful tools to secure significant environmental and public health benefits beyond those achieved by compliance, and to help address the needs of communities impacted by violations of environmental laws.

The Update covers when it is appropriate to include a SEP in an enforcement settlement, how to evaluate proposed SEPs, and the information and certifications that must be included in settlement documents. It reflects all SEP-related guidance documents issued by OECA over the past seventeen years, as well as the policy and implementation decisions made during two national meetings organized by OECA's Principal Deputy Assistant Administrator.<sup>1</sup> It also provides clarifying language on points of longstanding implementation practice and technical corrections. The 2015 Update highlights some notable Agency priorities, including Children's Health, Environmental Justice, Innovative Technology and Climate Change. In addition, for ease of use and clarity certain sections of the Update have been edited and reordered, and the Policy now includes a topical Table of Contents.

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<sup>1</sup> A complete list of these policy and implementation memoranda and decisions can be found at <http://intranet.epa.gov/oeca/oce/slpd/sep.html>.

The Update reflects the collaborative efforts of our National SEP Work Group, our Regional Counsel and Enforcement staff, our Office of General Counsel, the Department of Justice, and OECA staff from the Office of Civil Enforcement, the Federal Facilities Enforcement Office, the Office of Environmental Justice and the Office of Site Remediation Enforcement, as well as input from several EPA program offices. I appreciate their collective efforts and thank them for their willingness to help facilitate this Update.

My hope is that this Update will enable case teams to more efficiently and effectively include SEPs in settlement of civil enforcement cases, and I continue to actively encourage all enforcement practitioners to consider SEPs wherever they may be appropriate.

Questions regarding the 2015 Update may be directed to Caroline Makepeace (202-564-6012), Beth Cavalier (202-564-3271) or Jeanne Duross (202-564-6595) in the Special Litigation and Projects Division, Office of Civil Enforcement.

Attachment

cc:

Office of General Counsel  
Regional Counsels and Deputy Regional Counsels  
Regional Enforcement Directors  
Chief, Environmental Enforcement Section, Department of Justice  
OECA Office Directors  
Regional Enforcement Coordinators  
Headquarters and Regional SEP Policy Coordinators

U.S. Environmental Protection Agency  
Supplemental Environmental Projects Policy  
2015 Update



**United States Environmental Protection Agency  
Supplemental Environmental Projects (SEP) Policy  
2015 Update**

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**United States Environmental Protection Agency  
Supplemental Environmental Projects Policy  
2015 Update**

## **I. INTRODUCTION**

### **A. Background**

A Supplemental Environmental Project (SEP) is an environmentally beneficial project or activity that is not required by law, but that a defendant<sup>1</sup> agrees to undertake as part of the settlement of an enforcement action. SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. In settlements of environmental enforcement cases, the United States Environmental Protection Agency (the EPA or the Agency) requires alleged violators to achieve and maintain compliance with federal environmental laws and regulations, take action to remedy the harm or risk caused by past violations, and/or to pay a civil penalty. In certain instances, SEPs may be included in the settlement. In 1998, the EPA issued the Supplemental Environmental Projects Policy (Policy)<sup>2</sup> setting forth the types of projects that are permissible as SEPs, the terms and conditions under which a SEP may become part of a settlement, and the appropriate way to calculate a final penalty in light of the inclusion of a SEP in a settlement. The primary purpose of the SEP Policy is to encourage and obtain environmental and public health protection and benefits that may not otherwise have occurred in the settlement of an enforcement action.

The Agency encourages the use of SEPs that are consistent with this Policy. Case teams should consider SEPs early in the settlement process and, in appropriate cases, provide SEP ideas to defendants. SEPs are an important component of the EPA's enforcement program, but may not be appropriate in the settlement of all cases. Even in the absence of a SEP, enforcement settlements provide substantial benefits to communities and the environment. Penalties promote environmental compliance by deterring future violations by the defendant and other members of the regulated community. Penalties also help ensure a national level playing field for the regulated community. Injunctive relief measures ensure that compliance is achieved and maintained, and redress the harm caused by a violation, thereby providing long-term significant environmental and public health benefits to the impacted community. Where a proposed project could reasonably comprise part of the injunctive relief portion of a settlement, it should not be a SEP.

### **B. Using this Policy**

This Policy establishes a framework for the EPA to use in exercising its enforcement discretion in determining appropriate settlements. To include a proposed project in a settlement as a SEP, Agency enforcement and compliance personnel should:

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<sup>1</sup> For ease of use and brevity, "defendant" shall be used to mean both defendants in civil judicial settlements and respondents in administrative settlements.

<sup>2</sup> U.S. ENVTL. PROT. AGENCY, EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY (May 1, 1998).

1. Ensure that the project conforms to the basic definition of a SEP (Section III);
2. Ensure that all legal guidelines are satisfied (Section IV);
3. Ensure that the project fits within one (or more) of the designated categories of SEPs (Sections V and VI);
4. Determine the appropriate amount of penalty mitigation to reflect the project's environmental and/or public health benefits using the evaluation criteria (Sections VIII and IX); and
5. Ensure that the project satisfies all of the EPA procedures, settlement requirements and other criteria (Sections X-XII).

In some cases, strict application of this Policy may not be appropriate, in whole or in part. In such cases, the litigation team may use an alternative or modified approach, with advance approval from the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA).

#### C. Applicability

This Policy revises and supersedes the February 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements, the May 1995 Interim Revised Supplemental Environmental Projects Policy, and the May 1998 EPA Supplemental Environmental Projects Policy. It also reflects and incorporates by reference a number of memoranda and guidance documents that have been issued by the EPA since 1998 (*see* Appendix B). Where there may be inconsistencies between these documents and this Policy, this Policy shall supersede the memoranda and guidance documents. This Policy applies to settlements of all civil judicial and administrative enforcement actions filed after the effective date of this Policy and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of a SEP.

This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that the EPA administers. It may be used by the EPA and the Department of Justice (DOJ) in reviewing proposed SEPs in settlement of citizen suits. This policy also applies to federal agencies that are liable for the payment of civil penalties.

This is a settlement policy and thus is not intended for use by the EPA, defendants, courts, or administrative law judges at a hearing or in a trial. Further, the Agency's decision to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within the EPA's discretion. Even though a project appears to satisfy all of the provisions of this Policy, the EPA may decide, for one or more reasons, that a SEP is not appropriate (*e.g.*, the cost of reviewing a SEP proposal may be excessive, the

oversight costs of the SEP may be too high, the defendant may not have the ability or reliability to complete the proposed SEP, or the deterrent value of the higher penalty amount may outweigh the benefits of the proposed SEP).

This document is intended for use by EPA enforcement personnel in settling cases and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This document is not intended to supersede any statutory or regulatory requirements. Any inconsistencies between this document and any statute or regulation should be resolved in favor of the statutory or regulatory requirement. The EPA reserves the right to change this Policy at any time, without prior notice, or to act at variance with this Policy. This Policy does not create any rights, duties, or obligations, implied or otherwise, in any third parties.

## **II. SUPPORTING THE EPA'S MISSION**

SEPs can provide additional environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. Therefore, SEPs are an important component of the EPA's enforcement program, although they may not be appropriate in the settlement of all cases. SEPs can also help to further the EPA's mission to protect public health and the environment, which includes, but is not limited to, protecting children's health, ensuring environmental justice, promoting pollution prevention, encouraging the development of innovative technologies that protect human health and the environment, and addressing climate change.

### **A. Children's Health**

Protecting children's health from environmental risks is fundamental to the EPA's mission. Exec. Order No. 13045, *Protection of Children from Environmental Health Risks and Safety Risks*, 62 Fed. Reg. 19,885 (Apr. 23, 1997), directs each federal agency to "identify and assess environmental health risks and safety risks that may disproportionately affect children . . . ." The Executive Order recognizes the significant body of scientific knowledge demonstrating that children may suffer disproportionately from environmental health risks and safety risks.

Children are at increased risk because their neurological, immunological, and other systems are still developing and they eat, drink, and breathe more air in proportion to their body weight. Their smaller size and weight may diminish their protection from standard safety features, and their behavior patterns may make them more susceptible to exposure to environmental risks. Projects that reduce children's exposure to, or health impacts from, pollutants, and/or that reduce environmental risks to children in the community impacted by a violation are actively sought and encouraged.

### **B. Environmental Justice**

The EPA defines "environmental justice" (EJ) as the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.

Exec. Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 16, 1994), acknowledges that certain segments of the nation's population are disproportionately burdened by pollutant exposure. The Executive Order requires, to the greatest extent practicable and permitted by law, that federal agencies make achieving environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental impacts of its programs, policies, and activities on minority and low income populations in the United States and its territories.

Further, the EPA has stated that the term "EJ concern" indicates "the actual or potential lack of fair treatment or meaningful involvement of minority, low-income, or indigenous populations or tribes in the development, implementation, and enforcement of environmental laws, regulations, and policies."<sup>3</sup>

Defendants are encouraged to consider SEPs in communities where there are EJ concerns. SEPs can help ensure that residents who spend significant portions of their time in, or depend on food and water sources located near the areas affected by violations will be protected. However, due to the non-public nature of settlement negotiations there are legal constraints on the information the EPA can share during settlement negotiations, which are discussed in more detail in Section VII. In some situations, members of a community impacted by an environmental violation may feel that they lack meaningful involvement in the enforcement process, including the selection of a SEP. While members of an impacted community ordinarily would not be part of settlement negotiations, the EPA strongly encourages defendants to reach out to the community for SEP ideas and prefers SEP proposals that have been developed with input from the impacted community. During the public comment period required for many judicial settlements and certain administrative settlements, community members are afforded an opportunity to review and comment on any of the settlement's terms, including any SEPs that may be part of the resolution.

Because many different types of projects could benefit communities with EJ concerns, and are not limited to specific techniques, processes or activities, they have not been confined to a particular SEP category. Rather, because promoting environmental justice through a variety of projects is an overarching goal, EJ is one of the six critical factors on which SEP proposals are evaluated (*see* Section VIII). SEPs that benefit communities with EJ concerns are actively sought and encouraged.

### C. Pollution Prevention

The Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101-13109) identifies an environmental management hierarchy in which pollution "should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated

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<sup>3</sup> U.S. ENVTL. PROT. AGENCY OFFICE OF POLICY, ECON., AND INNOVATION (OPEI), OPEI REGULATORY DEVELOPMENT SERIES, INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION, EPA'S ACTION DEVELOPMENT PROCESS (July 2010).

in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort . . . .” Selection and evaluation of proposed SEPs should be conducted in accordance with this hierarchy of environmental management (*e.g.*, SEPs that utilize techniques or approaches to prevent the generation of pollution are preferred over other types of pollution reduction or control strategies). Projects that prevent the generation of pollution often provide the chance to utilize new and innovative technologies. Pollution prevention is one of the listed SEP categories. Effectiveness in developing and implementing pollution prevention techniques and practices is also a factor in evaluating a SEP, and can be reflected in the degree of consideration accorded to the defendant in the calculation of the final settlement penalty, and such projects are actively sought and encouraged.

#### D. Innovative Technology

SEPs provide defendants with an opportunity to develop and demonstrate new technologies that may prove more protective of human health and the environment than existing processes and procedures. SEPs also provide the EPA with a unique opportunity to observe and evaluate new technologies which might, should they prove effective and efficient, lead to better standard industry practices. Technology innovations may also be a means to assure that future industry and other commercial practices are sustainable, reflect the best available technology, and lead to continued long-term pollution reductions and improved public and environmental health. Innovative technology can take a variety of forms and may be applied broadly across environmental media and commercial, industrial and municipal activities, processes and practices. Innovative enforcement tools supporting OECA’s Next Generation Compliance, such as fenceline monitors, e-reporting, web posting of data and independent third-party audits, may be appropriate for consideration as SEPs where not achievable or appropriate as injunctive relief or mitigation in the context of a settlement.

Pollution reduction and pollution prevention projects often utilize innovative technologies, methodologies, and/or practices. Because of this wide-ranging potential for significant environmental and public health benefits, “innovation” is one of the six critical factors used to evaluate SEP proposals. SEPs that employ innovative technologies are actively sought and encouraged.

#### E. Climate Change

The Earth’s climate is changing. Temperatures are rising, snow and rainfall patterns are shifting, and more extreme climate events – such as increased floods and droughts, coastal storms, and record high temperatures – are already taking place. These observed changes are linked to the climbing levels of carbon dioxide and other greenhouse gases in our atmosphere. Reducing greenhouse gas emissions through, for example, energy efficiency projects that reduce emissions by reducing energy demand can contribute to reducing climate change. Projects that address the causes of climate change and reduce or prevent emissions of climate change pollutants and greenhouse gases, such as carbon dioxide, may qualify as SEPs.

In addition to working to curb climate change by reducing emissions, community members are taking action to make their communities more resilient in the face of climate impacts. Preparing

infrastructure and natural ecosystems for the changes that will occur with a changing climate can help communities adapt to climate change and be more resilient in avoiding or recovering from events resulting from a changing climate. For example, in some areas where increased rainfall is expected, increased runoff can lead to greater stress on water infrastructure and to degradation of water quality. Anticipating those impacts can help a community plan ahead to limit the negative impacts of these changes. Projects that address the impacts of climate change and that help increase a community's resilience in the face of these impacts on ecosystems or infrastructure, may qualify as SEPs.

### III. DEFINITION AND KEY CHARACTERISTICS OF A SEP

Supplemental environmental projects are defined as **environmentally beneficial projects** which a defendant agrees to undertake **in settlement of an enforcement action**, but which the defendant, or any other third party, is **not otherwise legally required to perform**. The three bolded key parts of this definition are described in more detail below.

- A. **“Environmentally beneficial”** means a SEP must improve, protect, or reduce risks to public health or the environment. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits public health and/or the environment.
- B. **“In settlement of an enforcement action”** means:
  - 1. The defendant's commitment to perform the SEP is included in a legally enforceable settlement document;
  - 2. The EPA has the opportunity to review and comment on the scope of the project before it is implemented; and
  - 3. The project is not commenced until after the Agency has identified a violation (*e.g.*, issued a notice of violation, administrative order, or complaint).<sup>4</sup>
- C. **“Not otherwise legally required to perform”** means the project or activity is not required by any federal, state, or local law or regulation or achievable under applicable environmental and other federal laws. SEPs cannot include actions which the defendant, or any other third party, is likely to be required to perform:

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<sup>4</sup> Because the primary purpose of this Policy is to obtain environmental and/or public health benefits that would not have occurred “but for” the settlement, projects which the defendant has previously committed to perform or has begun implementing before the settlement is final are not eligible as SEPs.



1. As injunctive relief,<sup>5</sup> including as a mitigation project,<sup>6</sup> in the instant case;
2. As injunctive relief in another legal action the EPA, or another regulatory agency, could bring;
3. As part of an existing settlement or order in another legal action; or
4. By any other federal, state or local requirement.

The performance of a SEP reduces neither the stringency nor the timeliness requirements of federal environmental statutes and regulations. Performance of a SEP does not alter a defendant's obligation to remedy a violation expeditiously and return to compliance. Projects or actions that are not required, but that reflect standard industry practices, are generally not acceptable as SEPs, but should be considered as part of the injunctive relief package.

#### IV. LEGAL GUIDELINES

The EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of a settlement. The evaluation of whether a proposed SEP is within the EPA's authority and consistent with all statutory and Constitutional requirements may be a complex task. Accordingly, this Policy uses the following legal guidelines to ensure that SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements.<sup>7</sup> Legal guidelines may not be waived, and are described below.

##### A. Nexus

1. All projects must have sufficient nexus. Nexus is the relationship between the violation and the proposed project.<sup>8</sup> Nexus ensures the proper exercise of the EPA's prosecutorial discretion and enables appropriate penalty mitigation for including the SEP in the settlement.

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<sup>5</sup> The statutes the EPA administers generally provide a court with broad authority to order a defendant to cease its violations, take necessary steps to prevent future violations, and to remediate any harm caused by the violations. If a court is likely to order a defendant to perform a specific activity in a particular case as injunctive relief or a mitigation project, such an activity does not qualify as a SEP.

<sup>6</sup> See Memorandum from Susan Shinkman, Dir., Office of Civil Enforcement, U.S. Env'tl. Prot. Agency, *Securing Mitigation as Injunctive Relief In Certain Enforcement Settlements* (2d ed., Nov. 14, 2012).

<sup>7</sup> These legal guidelines are based on federal law as it applies to the EPA; states may have more or less flexibility in the use of SEPs depending on their laws and this Policy does not purport to identify those requirements.

<sup>8</sup> The EPA's prosecutorial discretion to settle enforcement actions does not extend to the inclusion of SEPs that do not have a nexus to the violations being resolved. According to the Comptroller General of the United States (CG), enforcement settlements may contain "terms and undertakings that go beyond the remedies specifically" identified in the statute being enforced. However, the Agency's "settlement authority should be limited to statutorily authorized prosecutorial objectives: correction or termination of a condition or practice, punishment, and deterrence." See *Matter of: Commodity Futures Trading Commission – Donations Under Settlement Agreements*, 1983 WL 197623, B-210210, (Sept. 14, 1983). See also *Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, 1990 WL 293769, B-238419, (Oct. 9, 1990).

2. A project may not be inconsistent with any provision of the underlying statutes that are the basis of the enforcement action. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action.
3. Projects must relate to the underlying violation(s) at issue in the enforcement action. The project must demonstrate that it is designed to reduce:
  - a. The likelihood that similar violations will occur in the future;
  - b. The adverse impact to public health and/or the environment to which the violation at issue contributes; or
  - c. The overall risk to public health and/or the environment potentially affected by the violation at issue.

Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred, at a different site in the same ecosystem, or within the immediate geographic area.<sup>9, 10</sup> SEPs may have nexus even if they address a different pollutant in a different medium, provided the project relates to the underlying violation(s).

4. SEPs may not be agreements to spend a certain amount on a project that will be defined later. For a case team to properly evaluate a SEP's characteristics (the "what, where, when" of the SEP), and establish the connection to the underlying violation being resolved, the type and scope of each project must be specifically described and defined. Without a well-defined project with clear environmental or public health benefit, the EPA cannot demonstrate nexus.

## B. Augmentation and Other Issues

### 1. EPA Management or Control of SEPs

- a. The EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may the EPA retain authority to manage or administer the SEP. The EPA may, of

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<sup>9</sup> Ecosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always demonstrate a relationship to the violation in order to satisfy subparagraph a, b, or c in the definition of nexus. In some cases, a project may be performed at a facility or site not owned by the defendant, provided there is a relationship between the violation and the SEP. The immediate geographic area will generally be the area within a 50-mile radius of the site on which the violations occurred.

<sup>10</sup> Where a defendant proposes to perform the same activity at multiple facilities (including facilities without violations), nexus is easier to establish if the primary impact is at the same facility, or in the same ecosystem, or within the immediate geographic area as the violations, but the global SEP may be acceptable so long as at least part of it is at one of these locations.

course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.

- b. The EPA may not direct, recommend, or propose that the defendant hire a particular contractor or consultant to carry out the SEP (the “SEP implementer”). Similarly, the Agency may not direct, recommend or propose a specific organization to be the recipient of a SEP (the “SEP recipient”). The EPA may retain the right to disapprove contractors, consultants or organizations that the defendant proposes for Agency consideration, provided the Agency’s decision is based on objective criteria for assessing the entity’s qualifications (*e.g.*, experience, capacity, technical expertise) and fitness. The Agency may also specify the type of organization that will be the SEP recipient.

## 2. Federal Appropriations and Federally-Performed Activities<sup>11</sup>

### a. EPA-Specific:

- i. A project may not be used to satisfy the EPA’s statutory obligation or another federal agency’s obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, the EPA may not consider projects that do or would appear to circumvent that prohibition.
- ii. A project may not provide additional resources to support (including in-kind contributions of goods and services) specific activities performed by EPA employees or EPA contractors.<sup>12</sup> For example, if the EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure. A project may not provide resources (including, but not limited to, funding, services and/or goods) to perform work on EPA-owned property.
- iii. SEPs may not provide the EPA with additional resources to perform a particular activity for which the EPA receives a specific appropriation. SEPs may not have the effect of providing a recipient in a particular federal financial assistance transaction with the EPA with additional resources for the same specific activity described in the terms or scope

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<sup>11</sup> Appendix A, AUGMENTATION OF APPROPRIATIONS: REASONABLE INQUIRY REGARDING FEDERAL APPROPRIATIONS, provides case teams with assistance in ensuring that proposed SEPs meet the conditions of Legal Guidelines IV.B.2 and IV.C.

<sup>12</sup> This does not apply where the EPA has statutory authority to accept funds or other things of value from a non-federal entity.

of work for the transaction.<sup>13</sup> Examples of federal financial assistance transactions include grants, cooperative agreements, federal loans, and federally guaranteed loans.

b. Other Federal Agencies:

- i. A project may not provide resources (including, but not limited to, funding, services and/or goods) to perform work on federally-owned property, or provide additional support (including in-kind contributions of goods and services) for a project performed by another federal agency.<sup>14</sup>
- ii. SEPs may not have the effect of providing a recipient in a particular federal financial assistance transaction with another federal agency with additional resources for the same specific activity described in the terms or scope of work for the transaction. Examples of federal financial assistance transactions include grants, cooperative agreements, federal loans and federally guaranteed loans.

C. Augmentation: Reasonable Inquiry and Certification

1. By Defendants: In all settlements that include a SEP, defendants must certify that they have performed a reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations. The following must be included in all settlement documents:

*Defendant certifies that:*

- a. *It is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in paragraph X; and*
- b. *It has inquired of the SEP recipient and/or SEP implementer [use proper names where available] whether either is a party to an open federal*

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<sup>13</sup> OECA's 2011 interim revisions to Legal Guideline 5.b. of the 1998 SEP Policy included an additional prohibition on projects which were described in an unsuccessful federal financial assistance transaction proposal submitted to the EPA within two years of the date of the settlement, unless the Agency had rejected the proposal as statutorily ineligible. See Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Env'tl. Prot. Agency, *Transmittal of the Office of General Counsel's Opinion on Legal Guidelines Under the 1998 Supplemental Environmental Projects Policy Relating to Impermissible Augmentation of Appropriations* (Apr. 18, 2011). With approval of the Office of General Counsel, this prohibition has been eliminated.

<sup>14</sup> This does not apply to SEPs in which a federal agency expends appropriated funds on the project under a settlement of a federal facility enforcement case, or when a federal agency has statutory authority to accept funds or other items of value from a non-federal entity.

*financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the recipient and/or the implementer [use proper names where available] that neither is a party to such a transaction.*

2. By the EPA: The EPA also has an obligation to make a reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations, and this should be documented by the case team in its SEP approval memo and case file.

#### D. Augmentation Exception: Diesel Emissions Reduction Projects

In past fiscal years, the EPA has received specific appropriations for diesel emissions reduction projects. Regardless of whether the EPA continues to receive a specific appropriation, diesel emissions reduction projects may be accepted as SEPs because, in 2008, Congress enacted legislation granting the EPA authority to accept diesel emissions reduction SEPs, creating an express exception to the prohibition on augmenting appropriations for these types of projects.<sup>15</sup> Thus, for these projects, augmentation inquiries based on Legal Guidelines IV.B.2.a.iii and b.ii need not be performed, and the certification above, in Section IV.C.1, is not required. EPA case teams should, however, make the other augmentation inquiries, based on Legal Guidelines IV.B.2.a.i and ii, and IV.B.2.b.i.

In addition, the authorizing statute<sup>16</sup> requires that any settlement with a diesel emissions reduction SEP include the following certification:

*Defendant certifies under penalty of law that it would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction Supplemental Environmental Project, if the Agency were precluded by law from accepting a diesel emissions reduction Supplemental Environmental Project.*

Also, any diesel emissions reduction SEP must comport with all other conditions of this Policy, including the nexus requirement.<sup>17</sup> Diesel emissions reduction SEPs may not be implemented via cash donations. In the absence of a concurrent obligation for the defendant to ensure that the project occurs and is satisfactorily completed, it will be difficult to demonstrate that the SEP has nexus.

## **V. CATEGORIES OF SEPs**

The EPA has identified seven specific categories of projects which may qualify as SEPs. Many SEPs may fall into more than one category. In addition, there is an eighth category for “Other”

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<sup>15</sup> See Act of June 30, 2008, Pub. L. No. 110-255, § 1, 122 Stat. 2423.

<sup>16</sup> *Id.* at § 2, 122 Stat. 2423.

<sup>17</sup> See Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Env'tl. Prot. Agency, *Supplemental Environmental Projects to Reduce Diesel Emissions* (July 18, 2008).

projects that meet all conditions of the SEP Policy but do not readily fit in one of the seven specific categories.

#### A. Public Health

Public health projects include those that provide diagnostic, preventative and/or health care treatment related to the actual or potential harm to human health caused by the violation. This includes, but is not limited to, epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy. Examples of public health SEPs include blood lead level testing, asthma screening and treatment and mobile health clinics. Public health SEPs may also include projects such as mosquito eradication programs or donation of antimicrobial products to assist in natural disaster situations. Public health SEPs are acceptable only where the primary beneficiary of the project is the population that was harmed or put at risk by the violations.

#### B. Pollution Prevention

A pollution prevention project prevents pollution at its source, before it is generated. It includes any practice that reduces the quantity and/or toxicity of pollutants entering a waste stream prior to recycling, treatment, or disposal. After the pollutant or waste stream has been generated pollution prevention is no longer possible, and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods (*i.e.*, pollution reduction).

Source reduction projects may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water, or other materials, as well as “in-process recycling” wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on-site.

Projects that replace or reduce the use of traditional energy sources with alternative energy sources or that implement energy efficiency activities, potentially reducing air pollutants associated with electric power generation and greenhouse gases that contribute to climate change, may qualify as pollution prevention SEPs. Where such a proposed SEP addresses the same pollutant(s) or same health effect(s) caused by the pollutant(s) at issue in the case, and will be implemented within a fifty-mile radius of the site of the violation, the SEP should satisfy the nexus requirement and confer the required environmental benefits.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution produced and released into the environment,

not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency and conservation in the use of energy, water, or other materials.<sup>18</sup>

### C. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach which employs recycling, treatment, containment or disposal techniques may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as “pollution prevention.” This type of SEP may include the installation of a more effective end-of-process control or treatment technology, improved containment, or safer disposal of an existing pollutant source. Pollution reduction also includes “out-of-process recycling,” wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for off-site production.

### D. Environmental Restoration and Protection

An environmental restoration and protection project is one which enhances the condition of the ecosystem or immediate geographic area adversely affected by the violation.<sup>19</sup> These projects may be used to restore or protect natural environments and address environmental contamination and similar issues in man-made environments, and may include any project that protects the ecosystem from actual or potential damage resulting from the violation or that improves the overall condition of the ecosystem.<sup>20</sup> Examples of such projects include: restoration of a wetland in the same ecosystem along the same avian flyway in which the facility is located, or purchase and management of a watershed area to protect a drinking water supply where the violation (*e.g.*, a reporting violation) did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects which provide for the protection of endangered species (*e.g.*, developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation).

In some projects where the defendant has agreed to restore and then protect certain lands, the SEP may, under certain circumstances, include the creation or maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project and they constitute only an incidental portion of the total resources spent on the project.

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<sup>18</sup> This is consistent with the Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101-13109) and the U.S. ENVTL. PROT. AGENCY, POLLUTION PREVENTION POLICY STATEMENT: NEW DIRECTIONS FOR ENVIRONMENTAL PROTECTION (June 15, 1993).

<sup>19</sup> If the EPA lacks authority to require repair of the damage caused by the violation, then repair itself may constitute a SEP.

<sup>20</sup> Simply preventing new discharges into the ecosystem, as opposed to taking affirmative action directly related to preserving existing conditions at a property, would not constitute a restoration and protection project, but may fit into another category, such as pollution prevention or pollution reduction.

For a project in which the parties intend that a property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant may sell or transfer the land to another party with the established resources and expertise to perform this function, such as a state park authority. In some cases, the U.S. Fish and Wildlife Service or the National Park Service may be able to perform this function.<sup>21</sup>

With regard to man-made environments, such projects may involve the environmental remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and lead-based paint, which are a continuing source of releases and/or threat to individuals.

#### E. Assessments and Audits

There are three types of projects in the assessments and audits category: (1) pollution prevention assessments; (2) environmental quality assessments; and (3) compliance audits. These assessments and audits are only acceptable as SEPs when the defendant agrees to provide the EPA with a copy of the report and the results are made available to the public, except to the extent they constitute confidential business information (CBI) pursuant to 40 C.F.R. Section 2, Subpart B.

1. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production and generation of toxic and hazardous materials and other wastes. To be eligible as SEPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure. Pollution prevention assessments are acceptable as SEPs without an implementation commitment by the defendant where the case team determines that the SEP delivers other benefits worthy of SEP credit. Pollution prevention measures may be difficult to draft before the results of an assessment are known, and many of the implementation recommendations may constitute activities that are in the defendant's own economic interest and would not warrant SEP credit.
2. Environmental quality assessments are investigations of: the condition of the environment at a site not owned or operated by the defendant; the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by the defendant; or threats to human health or the environment relating to a site or a facility regardless of whether the site or facility is owned or operated by the defendant. Environmental quality assessments include, but are not limited to, investigations of levels or sources of contamination in any environmental media at a site and monitoring of the air, soil, or water quality surrounding a site or facility. Such monitoring

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<sup>21</sup> Certain federal agencies have explicit statutory authority to accept gifts such as land, money, or in-kind services. All projects benefitting these federal agencies must be reviewed and approved in advance by the office of the chief legal counsel of the recipient agency for consistency with statutory authority.



activities are important as the data can empower over-burdened communities, and inform and enhance efforts to reduce potential environmental risks and hazards. To be eligible as SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken. An assessment without a commitment to address the findings of the assessment are permissible where the case team determines that the SEP delivers other benefits worthy of SEP credit. Expanded sampling or monitoring by a defendant of its own emissions or operations does not qualify as a SEP to the extent it is ordinarily available as injunctive relief.

Environmental quality assessment SEPs may not be performed: at sites that are on the National Priority List under Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9605, and 40 C.F.R. Part 300; at specific sites that the EPA has determined to be eligible for a Brownfields assessment grant under CERCLA Section 104(k)(2), 42 U.S.C. § 9604(k)(2); and at all other sites, for assessments that the EPA or another federal agency can perform under its own authority, that a defendant or another party could be ordered to perform under an EPA or other federally-administered authority, or that are otherwise required under federal law.

3. Environmental compliance audits are independent evaluations of a defendant's compliance status with environmental requirements at a given point in time. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since there is already a requirement to achieve and maintain compliance with environmental regulations. As most large companies routinely conduct compliance audits, mitigating penalties for such audits would reward violators for performing an activity that most companies already do. Audits may be less commonly done by small businesses or state or local governments, perhaps in part due to cost. In general, compliance audits are acceptable as SEPs only when the defendant is a small business, small community,<sup>22</sup> or a state or local government entity.<sup>23</sup>

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<sup>22</sup> For purposes of this Policy, a small business is owned by a person or another entity that employs 100 or fewer individuals. Small businesses could be individuals, privately held corporations, farmers, landowners, partnerships, and others. A small community is one comprised of fewer than 2,500 persons.

<sup>23</sup> See Memorandum from Phyllis P. Harris, Principal Deputy Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Env'tl. Prot. Agency, *Clarification and Expansion of Environmental Compliance Audits Under the Supplemental Environmental Projects Policy* (Jan. 10, 2003).

#### F. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community in order to: (1) identify, achieve, and maintain compliance with applicable statutory and regulatory requirements or (2) go beyond compliance by reducing the generation, release, or disposal of pollutants beyond legal requirements. For these types of projects, the defendant may lack the experience, knowledge, or ability to implement the project itself and, if so, the defendant should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing a seminar directly related to correcting widespread or prevalent violations within the defendant's economic sector. Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements that were violated and where the EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act (CWA) pretreatment violations, the compliance promotion SEP must be directed at ensuring compliance with pretreatment requirements. Environmental compliance promotion SEPs require the special approvals described in Section XII.A.4.

#### G. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance, such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training, to a responsible state or local emergency response or planning entity. This assistance enables these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions, Local Emergency Planning Committees, and Local Fire Departments. EPCRA's reporting requirements enable states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment and the people that could be harmed by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations and there is no current federal financial assistance transaction that could fund the SEP. Further, this type of SEP is allowable only where the following violations are alleged in the complaint: violations of EPCRA; reporting violations under CERCLA Sections 103, 104(e) or 120, 42

U.S.C. §§ 9603, 9604(E), or 9620; violations of Section 112(r) of the Clean Air Act (CAA), 42 U.S.C. § 7412(r); or violations of other emergency planning, spill, or release requirements.

#### H. Other Types of Projects

Projects that do not fit within one of the seven categories above, but have environmental and/or public health benefits and are otherwise fully consistent with all other provisions of this Policy, are allowable as SEPs subject to the approval requirements in Section XII.A.4.

### VI. PROJECTS NOT ACCEPTABLE AS SEPs

The following are examples of the types of projects that are not allowable as SEPs. This list is not exhaustive.

- A. General public educational or public environmental awareness projects (*e.g.*, sponsoring public seminars, conducting tours of environmental controls at a facility, or promoting recycling in a community);
- B. Contributions to environmental research at a college or university;
- C. Cash donations to community groups, environmental organizations, state/local/federal entities,<sup>24</sup> or any other third party;<sup>25</sup>
- D. Projects for which the defendant does not retain full responsibility to ensure satisfactory completion;
- E. Projects which, though beneficial to a community, are unrelated to environmental protection (*e.g.*, making a contribution to a non-profit, public interest, environmental or other charitable organization, donating playground equipment, etc.);
- F. Studies or assessments without a requirement to address the problems identified in the study (except as provided for in Section V.E above);
- G. Projects which the defendant, SEP recipient, or SEP implementer will undertake, in whole or in part, with federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance;
- H. Projects that are expected to become profitable to the defendant within the first five years of implementation (within the first three years for SEPs implemented by defendants that are small businesses or small communities)

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<sup>24</sup> See *supra* footnote 21.

<sup>25</sup> Cash donations are prohibited because they may create the appearance of a diversion of penalty funds from the U.S. Treasury in violation of the Miscellaneous Receipts Act (MRA), 33 U.S.C. § 3302(b).

are prohibited. After that time period, profitable projects where the environmental or public health benefit outweighs the potential profitability to the defendant may be allowable under certain circumstances. (See Section XI.D, for additional information and requirements);<sup>26</sup>

- I. Projects that provide raw materials only, with no commitment from the defendant for a completed project utilizing the raw materials (*e.g.*, donating rail ties and gravel for a fish ladder but not actually ensuring that the ladder is built);
- J. Projects that are not complete, discrete actions with environmental or public health benefits;
- K. Projects for which completion depends on the actions or contributions of individuals or entities that are neither party to the settlement nor hired by the defendant as an implementer;
- L. Except in very limited circumstances, as described in Section XI.B, SEPs may not include actions that a third party is legally required to perform by any federal, state, or local law or regulation (also referred to as “third-party compliance” projects).

## VII. COMMUNITY INPUT

In appropriate cases, the EPA should encourage input on project proposals from the local community that may have been adversely impacted by the violations. Case teams should encourage defendants to seek community input as early in the SEP development process as possible.<sup>27</sup> Ideally, community input should be sought by the defendant and the EPA collaboratively, but in some cases the EPA should consider seeking community input even in the absence of the defendant’s participation (*e.g.*, cases in areas with environmental justice concerns). If a case team is aware of community interest in particular SEPs, the case team should feel free to share that information with the defendant. Soliciting community input during the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility.<sup>28</sup>

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<sup>26</sup> See Memorandum from John Peter Suarez, Assistant Adm’r, Office of Enforcement and Compliance Assurance, U.S. Env’tl. Prot. Agency, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (Dec. 5, 2003).

<sup>27</sup> In addition, in many civil judicial cases, the Department of Justice seeks public comment on lodged consent decrees through a Federal Register notice. 28 C.F.R. § 50.7. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized. See 40 C.F.R. Part 22.

<sup>28</sup> See Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003). This guidance includes appendices suggesting potential techniques and resources for conducting community outreach.

Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

Involving communities in consideration of SEPs enables the EPA and defendant to focus on the particular environmental priorities and concerns of a community, which is especially important if several different SEPs are being considered. The community also can be a valuable source of SEP ideas, including ideas that result in creative or innovative SEPs that might not otherwise have been considered.

Given the wide range of settlement scenarios, types of violations and communities, there are a number of factors that may help EPA staff determine whether or not community involvement may be appropriate in a particular case. Generally, these factors may include:

- A. The specific facts and circumstances of each case (*e.g.*, court-ordered deadlines, imminent and substantial endangerment situations, etc.);
- B. The willingness of the defendant to conduct a SEP;
- C. The willingness of the defendant to solicit and respond in a meaningful way to community input;
- D. The impact of the violations on the community, especially the community most directly affected by the facility's violations;
- E. The level of interest of the community in the facility and the potential SEP; and
- F. The amount of the proposed penalty and the settlement amount that is likely to be mitigated by the SEP.

Finally, SEPs are developed in the context of settlement negotiations. The EPA must carefully consider how to provide information to the public to facilitate its involvement in SEP consideration and development without undermining the non-public nature of settlement negotiations. Much of the information developed by the government may be privileged and therefore not appropriate for release to the public. In addition, a defendant may provide information to the government that must be kept confidential. For example, it may provide CBI to the EPA. CBI, by law, cannot be provided to the public.<sup>29</sup> Thus, each case will have limits on what information the EPA can make available to the public.<sup>30</sup> In judicial cases, DOJ will also retain authority to determine what information can be released to the community.

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<sup>29</sup> See 40 C.F.R. Part 2, Subpart B.

<sup>30</sup> See Memorandum from Granta Y. Nakayama, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Env'tl. Prot. Agency, *Restrictions on Communicating With Outside Parties Regarding Enforcement Actions* (Mar. 8, 2006).

The extent of community input and participation in the SEP development process will vary with each case. Except in extraordinary circumstances and with the agreement of the parties, representatives of community groups will not participate directly in the settlement negotiations. This restriction is necessary because of the non-public nature of settlement negotiations. Although communities are generally not direct participants in settlement negotiations, appropriate outreach to affected communities (especially those with environmental justice concerns) regarding SEPs is encouraged, as this may better inform settlement negotiations.

## **VIII. EVALUATION CRITERIA**

The EPA has identified several critical factors on which to evaluate proposed projects. SEP proposals should demonstrate that the project will effectively achieve or promote one or more of these overarching goals. The better the performance of the SEP under each of these factors, the higher the appropriate mitigation credit should be. Appropriate mitigation of the civil penalty for implementation of a SEP will be determined by the EPA based on these factors and other case-specific considerations.

### **A. Significant, Quantifiable Benefits to Public Health and/or the Environment**

While all SEPs must benefit public health and/or the environment, SEPs that perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and reduction in risk to public health. SEPs also will perform well on this factor to the extent they result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats), and promoting more resilient communities, infrastructure and ecosystems in the face of climate change.

### **B. Environmental Justice**

SEPs that perform well on this factor will mitigate damage or reduce risk to a community that may have been disproportionately exposed to pollution or is at environmental risk.

### **C. Community Input**

SEPs that perform well on this factor will have been developed taking into consideration input received from the affected community. Projects developed with active solicitation and consideration of community input are preferred.

### **D. Innovation**

SEPs that perform well on this factor will further the development, implementation, or dissemination of innovative processes, technologies, and/or methods which more effectively: reduce the generation, release, or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; promote compliance; or improve climate change preparedness and resilience. This includes technology-forcing techniques which may establish new regulatory benchmarks.

#### E. Multimedia Impacts

SEPs that perform well on this factor will reduce emissions to more than one medium and ensure that pollutant reductions are not being achieved by transferring pollutants from one medium to another.

#### F. Pollution Prevention

SEPs that perform well on this factor will develop and implement pollution prevention techniques and practices that reduce the generation of a pollutant.

### **IX. CALCULATION OF THE FINAL SETTLEMENT PENALTY**

A primary incentive for a defendant to propose a SEP is the potential mitigation of its civil penalty. In settling enforcement actions, the EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. The EPA also seeks substantial penalties in order to deter noncompliance. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and other members of the regulated community. Penalties help maintain a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Thus, any mitigation of penalties must be carefully considered.

#### A. Components of the Settlement Penalty

Statutes administered by the EPA generally contain penalty assessment criteria that a court or administrative law judge must consider in determining an appropriate penalty during a trial or hearing. In the settlement context, the EPA follows these criteria, and program- or media-specific penalty policies based on the statutory criteria, in exercising its discretion to establish an appropriate penalty for purposes of settlement (settlement penalty). In calculating an appropriate penalty, the EPA considers factors such as the economic benefit associated with the violations, the gravity or seriousness of the violations and the violator's prior history of noncompliance.

Settlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s).

SEPs are not penalties, nor are they accepted in lieu of a penalty. However, a violator's commitment to perform a SEP is a relevant factor for the EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP, compared to the violator who does not.

B. Minimum and Maximum Penalty Requirements When SEPs Are Included in Settlement

1. Minimum Penalty Requirements

Settlements that include a SEP must always also include a penalty. In settlements in which defendants commit to conduct a SEP, the final settlement penalty must equal or exceed either:

- a. The economic benefit of noncompliance plus ten percent (10%) of the gravity component; or
- b. Twenty-five percent (25%) of the gravity component only; whichever is greater.

2. Exceptions to the Minimum Penalty Requirements

For certain types of settlements the minimum penalty required by the statutory penalty policy, or allowed by special exception, differs from the minimum penalty requirements of this Policy.

- a. Clean Water Act Settlements with Municipalities using the NMLC

The EPA's Interim Clean Water Act Settlement Penalty Policy (Mar. 1, 1995) (CWA Penalty Policy) applies to civil judicial and administrative penalties sought under Sections 309(d) and (g) of the CWA, 33 U.S.C. §§ 1319(d) and (g), including violations of Sections 301, 307, 308, 309(a) and 405, 33 U.S.C. §§ 1311, 1317, 1318, 1319(a) and 1345. The CWA Penalty Policy sets forth how the Agency generally exercises its prosecutorial discretion in deciding on an appropriate enforcement response and determining an appropriate settlement penalty. In cases with a municipality or other public entity (such as a sewer authority) for violations of the CWA, the Agency may provide for substantially reduced penalties based on the CWA Penalty Policy's national municipal litigation considerations (NMLC).

The NMLC provisions are designed to take into account a number of different criteria unique to municipalities and are intended to recognize and account for the special circumstances faced by municipalities when settling CWA matters. However, the NMLC does not provide separate economic benefit and gravity amounts, so the analysis required to determine the minimum SEP penalty as provided above cannot be performed when using NMLC penalties. Additionally, due to the high capital costs and correspondingly high amount of economic benefit that are typical in such cases involving municipalities, if the minimum SEP penalty were calculated based on the actual economic benefit amount, the